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RECORD, CASE No. 14,487.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1031.

THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS WELLMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED FEBRUARY 21, 1891.

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1 STATE OF MICHIGAN:

In the Supreme Court.

THOMAS WELLMAN
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Charles C. Hopkins, clerk supreme court.

SIR: Please issue a writ of error in the above-entitled cause in favor of the defendant, directed to the judge of the circuit court for the county of St. Clair and returnable thirty days after November 30, '89; action of trespass on the case.

Yours, etc., E. W. MEDDAUGH,
Attorney for Defendant and Appellant.

Dated Nov. 29, 1889.

2 [Endorsed:] No. 10902. Supreme court of the State of Michigan. Thomas Wellman, plaintiff and appellee, *vs.* The Chicago & Grand Trunk Railway Company, defendant and appellant. Præcipe for writ of error. Filed Nov. 30, 1889. Chas. C. Hopkins, clerk supreme court. E. W. Meddaugh, attorney for appellant.

3 STATE OF MICHIGAN:

In the Supreme Court.

THOMAS WELLMAN, Plaintiff & Appellee,
vs.
THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY, Def't & Appellant.

SIR: Please take notice that the defendant in the above-entitled cause has caused a writ of error to be issued out of and under the seal of the supreme court of the State of Michigan, directed to the judge of the circuit court for the county of St. Clair. Said writ of error is dated November 30, 1889, and is returnable at the supreme court room, in the city of Lansing, on the 20th day of December, 1889.

Yours, etc., E. W. MEDDAUGH,
Attorney for Defendant & Appellant.

Dated December 9, 1889.

To Hon. Wm. T. Mitchell, attorney for plaintiff.

4 [Endorsed:] No. 10902. Supreme court of the State of Michigan. Thomas Wellman, plaintiff and appellee, *vs.* The Chicago & Grand Trunk R'y Co., defendant and appellant. Proof of service of notice of the issuing of writ of error. Filed Dec. 11,

1889. Chas. C. Hopkins, clerk supreme court. E. W. Meddaugh, attorney for appellant.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Louis C. Stanley, being duly sworn, deposes and says that on the ninth day of December, 1889, he served a notice, of which the within is a true copy, upon Hon. Wm. T. Mitchell, attorney for the — in the within-entitled cause, by delivering the same to him personally.

L. C. STANLEY.

Subscribed and sworn to before me this ninth day of December, 1889.

FRANCIS E. RANKIN,
Notary Public, Wayne County, Michigan.

5 STATE OF MICHIGAN:

Supreme Court.

THOMAS WELLMAN, Plaintiff and Appellee,
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY, Defendant and Appellant.

Declaration.

STATE OF MICHIGAN:

In the Circuit Court for the County of St. Clair.

STATE OF MICHIGAN, } ss:
County of St. Clair, }

Thomas Wellman, plaintiff in this suit, by William T. Mitchell, his attorney, comes into court and files this declaration as commencement of suit, and complains of the Chicago & Grand Trunk
6 Railway Company, a railroad corporation organized under the general railroad laws of the State of Michigan, defendant in this suit—

For that whereas heretofore, to wit, on the second day of October, in the year A. D. 1889, the said railway company was operating and running passenger cars over its railroad from the city of Port Huron to and through the city of Battle Creek, in this State, and thence on to the city of Chicago, in the State of Illinois;

And whereas the gross earnings of the passenger trains of the said Chicago & Grand Trunk Railway Company, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equaled and exceeded the sum of three thousand dollars for each mile of road operated by said company;

And whereas, by an amendment of the law under which said Chicago & Grand Trunk Railway Company was organized and was

and is operating its said road, passed by the legislature of the State of Michigan and approved by the governor thereof on the 28th day of June, A. D. 1889, and (which) became operative and in force on the first day of October, in the year 1889—by the terms and provisions of which amendment and law the said railway company, whose gross earnings of its passenger trains, as reported as aforesaid, exceeded the sum of three thousand dollars for each mile of road so operated by said company, became and was bound to accept and carry passengers over and upon its said road for any distance over five miles for and at the rate of two cents per mile;

And whereas, on the said second day of October, in the year 1889, at the city of Port Huron, the said plaintiff, desiring to go to
7 and having important business at the city of Battle Creek, a regular and important station on the line of said company's said road one hundred and sixty miles distant from Port Huron, and a short and sufficient time before the departure of a regular passenger train of said company over and on said road from the city of Port Huron to the said city of Battle Creek, applied to Frank M. Pomroy, the regular passenger and ticket agent of the said company, at the regular passenger station of said company on its said road in said city of Port Huron, for a ticket to the said city of Battle Creek to enable said plaintiff to take passage and go as a passenger in the cars of said company, then about to leave for the said city of Battle Creek and beyond, and offered and tendered to the said ticket agent the sum of three dollars and twenty cents in legal-tender money, to wit, silver coin of the United States, and at the same time demanded a passenger ticket to said city of Battle Creek, the sum so tendered being at the rate of two cents per mile on said road from Port Huron to Battle Creek, the actual distance between the two places being 159¾ miles:

Yet the said Chicago & Grand Trunk Railway Company, totally disregarding and contrary to the statute in such case made and provided, by its said passenger and ticket agent, refused to accept the sum of money so as aforesaid tendered by the plaintiff for a ticket and passage from the city of Port Huron to the city of Battle Creek, and, contrary to the statute in such case made and provided, refused to give him, said plaintiff, a ticket or passage to Battle Creek for the sum so tendered and offered, and so kept and deprived him, the plaintiff, from going to Battle Creek as a passenger on said train of cars as aforesaid, to the great injury and damage of the plaintiff, to wit, to his damage five hundred dollars; wherefore he brings suit, &c.

WM. T. MITCHELL,
Plaintiff's Attorney.

Defendant pleaded the general issue.

8a STATE OF MICHIGAN:

In the Circuit Court for the County of St. Clair.

THOMAS WELLMAN
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

And now comes the defendant, by E. W. Meddaugh, its attorney, and demands a trial of the matters set forth in plaintiff's declaration.

E. W. MEDDAUGH,
Att'y for Def't.

8b At a general term of the circuit court for the county of St. Clair continued and held in the court-house, in the city of Port Huron, on Wednesday, the 27th day of November, A. D. 1889.

Present: Hon. Arthur L. Canfield, circuit judge.

THOMAS WELLMAN
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

In this cause, the parties being present by their respective attorneys ready for trial, thereupon came a jury, to wit, Truman Skinner, William Belyea, William J. Gardner, Ferdinand Czisky, George W. Bailey, John H. Smith, John Barton, James Pound, Stephen Mettig, Rudolph Engel, Ralph Davis, and Jesse W. Winn, good and lawful men, who were duly impannaled, tried, and sworn well and truly to try the issue between the parties, sat together and heard the proofs and allegations of the parties, the arguments of counsel, and the charge of the court, and, without retiring from the bar thereof to consider of their verdict to be given, say upon their oath that the said defendant is guilty in manner and form as the said plaintiff hath in his declaration in this cause complained against it, and that they assess the damages of the said plaintiff on occasion of the premises over and above his costs and charges by him about his suit in this behalf expended at the sum of one hundred and one dollars. Therefore it is considered that the said plaintiff do recover against the said defendant his damages aforesaid, together
8c with his costs and charges aforesaid, to be taxed, and that said plaintiff have execution thereof.

ARTHUR L. CANFIELD,
Circuit Judge.

8 STATE OF MICHIGAN:

In the Circuit Court for the County of St. Clair.

THOMAS WELLMAN
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Bill of Exceptions.

On the 27th day of November, 1889, this cause came on for trial by jury, the plaintiff being present by his attorney, Hon. Wm. T. Mitchell, and the defendant being present by its attorney, L. C. Stanley.

The following statement of facts admitted by the parties was read in evidence and submitted to the court and jury:

On behalf of the plaintiff:

1st. That the plaintiff, on the 2d day of October, A. D. 1889, applied to the proper and duly authorized agent of the defend-
9 ant, at his office, in Port Huron, Michigan, for a ticket from Port Huron to Battle Creek, on defendant's railroad, tendering therefor the sum of three dollars and twenty cents, which ticket was refused by said ticket agent unless the plaintiff should pay therefor the further sum of one dollar and sixty cents.

2d. That the distance between Port Huron and said Battle Creek by defendant's railroad is one hundred and fifty-nine and three-quarters miles.

3d. That the earnings of defendant from its passenger trains, as reported to the commissioner of railroads and in fact, for the year 1888 exceeded the sum of three thousand dollars per mile for each mile of railroad operated by it.

On behalf of the defendant:

1st. That it is an incorporated company under and pursuant to the laws of the States of Michigan, Indiana, and Illinois, and owns and operates a railroad between the city of Port Huron and the city of Chicago, a distance of three hundred and thirty-five miles.

2nd. That at the time of plaintiff's application for a ticket and tender of money as aforesaid the regular fare charged to and payable by all persons carried by defendant over its road from Port Huron to Battle Creek was $4.80, and this had been the regular fare between said places as exacted from and paid by all persons for more than five years last past, and was the same rate per mile that defendant uniformly charged at the time and for more than five years previous had charged all other persons for transportation upon its road.

3rd. That defendant's capital stock which has been fully paid in is $6,600,000.

4th. That defendant's bonded debt is $12,000,000, one-half of which bears interest at the rate of six per cent. per annum,
10 and the other half of which bears interest at the rate of five per cent. per annum, interest on both being payable semi-annually.

5th. That the mortgage debt and capital stock represent actual money invested in the construction and improvement of defendant's railroad and in its equipment, and that the railroad, property, and equipment of defendant is, in fact, worth more than the sum of said capital stock and mortgage debt.

6th. That in addition to the mortgage debt the defendant has an unfunded debt, partly incurred for improvements and additions to its railroad and equipment and partly for bond interest not earned or paid in previous years, of $896,906.40, on some of which it pays interest at the rate of 6¾ per cent. per annum and on some of it 5 per cent. per annum.

7th. That the total earnings and income of the defendant from all sources for the year 1888 was $3,228,338.17.

Of this amount there was received from passenger traffic the sum of	$1,065,502 94	
And from freight traffic the sum of	2,160,180 23	
From miscellaneous sources	2,655 00	
Total		$3,228,338 17
8th. That defendant's operating expenses for the year 1888 were	$2,404,516 54	
The interest paid on its bonds was	661,335 36	
Other necessary expenses, including interest on part of the unfunded debt, rental of cars, tracks, &c.	150,305 61	
		$3,216,157 51
9th. That, in addition to the foregoing expenses, defendant paid during the year 1888, from its earnings, on account of interest on bonds not paid in previous years		12,257 94
		$3,228,415 45

The foregoing are fixed charges, which can only be diminished in future out of earnings of the road or by an increase of capital. No part of the mortgage debt matures until the year 1900.

The plaintiff introduced evidence tending to show that he had suffered damage by reason of the refusal to sell him a ticket, as mentioned in the stipulation.

The defendant, further to maintain the issue on its part, introduced and read in evidence depositions taken by stipulation and filed in the cause, as follows:

GEORGE B. REEVE sworn.

By Mr. MEDDAUGH:

Q. Where do you reside, Mr. Reeve?
A. In Chicago.

Q. What is your business?
A. Traffic manager of the Chicago & Grand Trunk railway.
Q. How long have you been its traffic manager?
A. Eight years.
Q. Have you resided in Chicago during all this time?
12 A. Yes, sir.
Q. Your duties as traffic manager are what, in a general way, in reference to the traffic of the company?
A. To look after the traffic generally, making the arrangements for the rates and charges, both passenger and freight.
Q. Are you familiar with the rates, then, on the entire line of the road from Chicago to Port Huron?
A. Yes, sir.
Q. Local and through?
A. Yes, sir.
Q. Are you familiar with the conditions and circumstances which affect and determine these rates?
A. I am, sir.
Q. What is the competition on through rates between Chicago and the East over the C. & G. T. line, freight and passenger both—through and local?
A. The competition on through business arises by eight competing lines—direct competing lines.
Q. By rail?
A. By rail, and also, during the season of navigation, by water. For passengers there is competition of the all-rail lines only.
Q. For through traffic?
A. For through traffic.
Q. How about the local traffic and traffic originating and terminating upon the line, but going to other lines?
A. The local traffic—you can almost say there is none that is not competitive but our being crossed by so many roads. Nearly all our traffic comes under the head of competitive traffic.
Q. State whether in your opinion it is possible to advance
13 the through or local rates of freight of the C. & G. T. road above the rates now prevailing and the rates that have prevailed for the year 1888?
A. It is absolutely impossible for us to advance our through rates, as they are made entirely by agreements with all the roads, I may say, from the Mississippi river east. My own opinion is that the rates as now in effect will never be advanced, with the exception that some of the roads have now in effect a rate of 20 cents on corn alone and 25 cents on other grains, and I mean by my answer that I do not think the 6th-class rate, which is the basing rate, will ever be advanced over and above 25 cents.
Q. What would be the effect of an advance of through-freight rates by the C. & G. T. line—its withdrawal, in other words, from the association and agreement which determines the through rate?
A. I should say that we would lose at least 92 per cent. of our business, the other 8 per cent. being purely local.

Q. What would be the effect of an advance of the local rates by the company, acting independently?

A. That question can be answered beyond doubt, as we have experienced it, as between the first of April, 1887, and the 15th of July, 1887, where rates were from 10 to 30 per cent., our rates in Michigan were from 10 to 30 per cent. higher than our competitors', and the traffic to all competitive points was lost to us, and to non-competitive points was handed to us at the nearest junction to the local station, upon which we received a very slight revenue.

Q. Then, as I understand you, the prevailing rates, through and local, on freight are and were in the year 1888 as high as the traffic would bear?

A. Certainly.

14 Q. Is there any other consideration, aside from that of competition, which determines the rate on through and local traffic, such as a market price of commodities to be moved?

A. On through traffic there is.

Q. What?

A. Occasionally, for instance, if business is very dull, the railway companies will get together and reduce the rates temporarily, with a view of moving traffic that otherwise would remain in store until the markets advanced.

Q. In other words, there is not sufficient margin in the selling price of the commodity at the market to justify the moving of the property?

A. That is it, sir; and when we are very short of business, to keep up our gross revenue, we temporarily lose sight of the net revenue in order to furnish money to meet our immediate requirements.

Q. As a traffic man, Mr. Reeve, of large experience, what do you say as to the prospect of a higher rate prevailing on freight, through and local, in the future?

A. I do not think the through rates we shall ever see any higher than they are at the present time, and if that is a fact I cannot hope that the local rates will be advanced very much.

Q. What do you mean by local rates, Mr. Reeve?

A. Local rates on traffic that originates at points on our own line and destined for any other point on our own line.

Q. And by through rates what do you mean?

A. Rates on traffic that originates at any point on our own line and destined to any point on any other railway, or originating on any other road destined to any point on our road or beyond our own line and passing over it.

15 Q. Mr. Reeve, what, as the result of your experience—what would you say will be the result upon the earnings of the C. & G. T Company of the reduction of the passenger rates under the recent act of the Michigan legislature, its earnings from passenger traffic?

A. It is simply going to deplete our revenue almost to the extent of the reduction, and I do not believe that we are going to get any extra compensation by extra travel, by an increase of travel. The excursions that we give from time to time are gotten up in the

interest principally of local associations, churches, charitable institutions, lodges, and organizations of that kind.

Q. Is it your experience, Mr. Reeve, that there is any profit in such excursion rates?

A. My experience is the very reverse. I do not believe there is any profit at all in nine-tenths of the excursions that are run.

Q. Whether, if the earnings of the company were equal to all its requirements, there would be any object in giving these excursion rates.

A. There would be no object whatever, and I do not believe there is a railway in the world that would run an excursion at a reduction of rate below the regular rates if they were able to meet their liabilities by their traffic.

Cross-examined.

Judge MITCHELL:

Q. What do you mean when you say the reduction of rates is going to deplete your revenue almost to the extent of the reduction?

A. I mean by that that the slight increase that might be
16 given by the reduction in the rate would come in there, and therefore the total reduction is not the whole difference, but almost.

Q. Will these reductions result from passenger fares mostly if the new law is enforced?

A. If I understand it, it only applies to passengers.

Q. Will that result in any large reduction of the income of the railroad?

A. It will.

Q. How if there are other roads that are not affected by the law? Will that make any difference with you?

A. It will compel them to reduce their rates to a very great extent.

Q. What are the roads through Michigan that you compete with?

A. We are competitive with the Michigan Central, the Lake Shore, Grand Rapids & Indiana, the Detroit, Grand Haven & Milwaukee, Toledo, Ann Arbor & North Michigan, Flint & Pere Marquette, Grand Trunk Railway of Canada, the Cincinnati, Wabash & Michigan, Baltimore & Ohio, Detroit, Lansing & Northern.

Q. Are none of those roads affected by this reduction of rate that now affects the Chicago & Grand Trunk?

A. Some of them are affected, but I do not know to what extent.

Q. For instance, is the Michigan Central affected?

A. The Michigan Central are affected only partially.

Q. I mean directly by the law.

A. No; I believe not.

Q. Or the Detroit, Grand Haven & Milwaukee?

17 A. They are not.

Q. And these will be only incidentally affected, as I understand you; by the operation of the law in reducing rates on your

road, they may be compelled to make the same rates or partially meet them upon their road?

A. That is what I mean.

JAMES H. MUIR sworn.

By Mr. MEDDAUGH:

Q. Are you an officer of the Chicago & Grand Trunk Railway Company?

A. I am.

Q. In what capacity?

A. Treasurer of the company.

Q. Have you had occasion to investigate the question of what percentage of the gross earnings upon its passenger traffic it costs to do the business?

A. I have.

Q. Will you state the result of that investigation and how it is arrived at—on the Chicago & Grand Trunk road?

A. The division of expenses that are joint between freight and passenger service is best made on the basis of train mileage, taking one-fourth of the mileage of mixed trains as passenger mileage. On that basis, for the twelve months ending on the 30th of June, 1889, the passenger expenses are 75.42 per cent. of the gross passenger receipts.

Q. And how about the freight?

A. The freight expenses being 70.67 per cent. of the gross freight receipts. The passenger receipts include the mails and express freight that are carried on the passenger trains in addition to the fares from passengers.

18 Q. What authority has this basis?

A. The basis stated is the one adopted by the Interstate Commerce Commission of the United States—no doubt from expert testimony on the question. There are different theories as to the division of joint expenses, but this is undoubtedly the best basis that can be adopted.

Cross-examined.

By Judge MITCHELL:

Q. Whether you would have any means of knowing what would be the gross receipts from passengers alone, independently of mails and express matter.

A. Yes; we make that up. We not only make that up, but we eliminate the baggage from the passengers. We can give you the passengers and the baggage separate—extra baggage, gross expense, and miles.

Q. Then in relation to the expenses or net earnings, what they would be, can you make an estimate of what that would be, independently of the other matters?

A. Oh, no; they are all aboard the same train from which the mileage is taken.

The foregoing is all the testimony introduced on the trial of said cause.

Thereupon counsel for the defendant requested the court, in writing, to instruct the jury as follows:

1. The act under which the plaintiff brings his suit is unconstitutional and the plaintiff cannot recover in this case; therefore your verdict will be for the defendant.

Which request the court refused to give; to which refusal defendant excepted.

19 Thereupon the court gave the following instructions to the jury:

I charge you, gentlemen, that by act No. 202 of the public acts of this State of 1889 all railroad corporations owning or operating railroads in this State, the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year 1888, equalled or exceeded the sum of three thousand dollars for each mile of road operated by said company, were required to transport passengers at the rate of two cents per mile.

It is admitted that the defendant's earnings per mile, as reported to the commissioner, exceeded that sum.

It is claimed by the defendant that this law is unconstitutional and void, but I charge you the law is valid, and that under that law the defendant was bound to transport the plaintiff at the rate of two cents per mile, and for its refusal so to do the plaintiff may recover, and it is for you to assess his damages at such sum as you think him entitled to under all the circumstances, and such as will compensate him for the injury he is shown to have sustained.

And the said circuit judge, under the charge and with the directions aforesaid, left the aforesaid issue and the evidence so given on the trial thereof as aforesaid to said jury, and the jury aforesaid then and there gave their verdict for the said plaintiff and assessed his damages on occasion of the premises at the sum of one hundred and one dollars.

And, inasmuch, as none of the aforesaid matters appear of record in said cause, the said circuit judge has this 27th day of November, 1889, at the request of counsel for defendant, settled and signed this bill of exceptions.

ARTHUR L. CANFIELD,
Circuit Judge.

20 STATE OF MICHIGAN:

Supreme Court.

THOMAS WELLMAN, Plaintiff and Appellee,
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY, Defendant and Appellant.

Assignment of Error.

Now comes the defendant, by E. W. Meddaugh, its attorney, and

says that in the record and proceedings and also in the giving of the judgment in the above-entitled cause in the court below there is manifest error in the following particulars, to wit:

1. Because the circuit court erred in refusing to give defendant's request to charge numbered 1, which is as follows:

"The act under which the plaintiff brings his suit is unconstitutional and the plaintiff cannot recover in this case; therefore your verdict will be for the defendant."

E. W. MEDDAUGH,
Att'y for Def't and Appellant.

21 STATE OF MICHIGAN:

The Circuit Court for the County of St. Clair.

THOMAS WELLMAN
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

COUNTY OF ST. CLAIR, *ss:*

I, Leigh Freeman, deputy clerk of the county and court aforesaid, do hereby certify that the above is a true and compared copy of the original declaration, plea, and other papers filed in this cause and of the rules and final judgment entered therein and the whole of said cause remaining of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court this 16th day of December, A. D. 1889.

[SEAL.] LEIGH FREEMAN,
Dep. Clerk.

22 The People of the State of Michigan to the judge of our circuit court in and for the county of St. Clair, Greeting:

Because in the record and proceedings, and also in the giving of judgment in a plaint which was in our said circuit court, [SEAL.] before you, between Thomas Wellman, plaintiff, and The Chicago & Grand Trunk Railway Company, defendant, in a plea of trespass on the case, manifest error hath intervened, to the great damage of the said defendant, as by its complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you that if judgment be thereupon given, then you send to our supreme court, distinctly and openly, under your seal, the record and proceedings of the plaint aforesaid, together with all things concerning the same, and this writ, so that our said court may have them at the supreme-court room, in the capitol, in the city of Lansing, on the twentieth day of December next, that, the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of Michigan ought to be done.

Witness the Honorable Thomas R. Sherwood, chief justice of our

supreme court, at Lansing, this thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

CHAS. C. HOPKINS,
Clerk of the Supreme Court.

23 [Endorsed:] No. 10902. Supreme court of the State of Michigan. Thomas Wellman, plaintiff, *vs.* The Chicago & Grand Trunk Railway Co., defendant & app'l't. Writ of error. Filed Dec. 23rd, 1889. Chas. C. Hopkins, clerk supreme court. E. W. Meddaugh, attorney for appellant.

To the supreme court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

December 16, 1889.

[L. S.] LEIGH FREEMAN,
Clerk of the Circuit Court for the County of St. Clair.

24 At a session of the supreme court of the State of Michigan held at the supreme-court room, in the city of Lansing, on the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable John W. Champlin, chief justice; Allen B. Morse, James V. Campbell, Charles D. Long, Claudius B. Grant, associate justices.

THOMAS WELLMAN, Plaintiff,
vs.
CHICAGO & G. T. R'Y CO., Defendant and Appellant.

This cause, coming on to be heard, is submitted on briefs.

25 At a session of the supreme court of the State of Michigan held at the supreme-court room, in the city of Lansing, on the sixteenth day of May, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable John W. Champlin, chief justice; Allen B. Morse, Edward Cahill, Charles D. Long, Claudius B. Grant, associate justices.

THOMAS WELLMAN, Plaintiff,
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY, Def't & App'l't.

In this cause a rehearing is ordered by the court to take place at the next January term, and the clerk is directed to place it on the term docket without further notice.

26 At a session of the supreme court of the State of Michigan held at the supreme-court room, in the city of Lansing, on the thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable John W. Champlin, chief justice; Allen B. Morse, Edward Cahill, Charles D. Long, Claudius B. Grant, associate justices.

THOMAS WELLMAN, Plaintiff,
vs.
CHICAGO & GRAND TRUNK RAILWAY CO., Def't & App'l't.

This cause, coming on to be heard, is argued by counsel in part.

27 At a session of the supreme court of the State of Michigan held at the supreme-court room, in the city of Lansing, on the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable John W. Champlin, chief justice; Allen B. Morse, Edward Cahil, Charles D. Long, Claudius B. Grant, associate justices.

THOMAS WELLMAN, Plaintiff,
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY, Def't & App'l't.

The argument heretofore commenced herein is concluded and the cause submitted.

28 At a session of the supreme court of the State of Michigan held at the supreme-court room, in the city of Lansing, on the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable John W. Champlin, chief justice; Allen B. Morse, Edward Cahill, Charles D. Long, Claudius B. Grant, associate justices.

THOMAS WELLMAN, Plaintiff,
vs.
THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY, Defendant and Appellant.

The record and proceedings in this cause having been removed to this court by a writ of error issued to the circuit court for the county of St. Clair, and the same and the matters in error assigned having been seen and inspected and duly considered by the court, and it appearing to this court that in said record and proceedings and in the giving of judgment in said circuit court there is no error, therefore it is ordered and adjudged that the judgment of said circuit court for the county of St. Clair be, and the same is hereby, in all things affirmed, and that the plaintiff do recover of the defendant his costs, to be taxed, and that he have execution therefor.

[Endorsed:] No. —. State of Michigan. The circuit court for county of ——. —— —— *vs.* —— ——. Remittitur from supreme court affirming judgment of circuit court. Filed —— —, 189–. —— ——, clerk. —— ——, attorney for —— ——.

29 *Opinion. Filed Dec.* 24, 1890.

Supreme Court of Michigan.

THOMAS WELLMAN
vs.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

By act No. 202 of the public acts of 1889 section 3323 of Howell's Statutes, being a part of the general railroad law of this State, was amended.

This amendment, for the purposes of this case, is given here in so far as it affects it.

It is enacted that every railroad corporation shall possess the general powers and be subject to the liabilities and restrictions following—that is to say:

"Ninth. To regulate the time and manner in which passengers and property shall be transported and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed the following prices, viz: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equalled or exceeded the sum of $3,000 per mile of road operated by said company, two cents per mile, and for all companies the earnings of whose passenger trains reported as aforesaid were over $2,000 and less than $3,000 per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as
30 aforesaid were less than $2,000 per mile of road operated by said company, three cents per mile: Provided that in future whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of $2,000 or $3,000 per mile of road operated by said company, then, in such case, said companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, a rate of two cents and a half or two cents per mile, as hereinbefore provided: Provided that roads in the upper peninsula which report, as above provided, passenger earnings exceeding $3,000 per mile shall not charge to exceed three cents per mile, and roads reporting less than $3,000 per mile shall be allowed to charge not to exceed four cents per mile."

P. A. of 1889, pp. 282, 283.

The gross earnings of the defendant corporation as shown by the report of said corporation to the railroad commissioner for 1888 exceeded the sum of $3,000 per mile.

The law took effect the 2nd day of October, 1889.

On that day the plaintiff applied at the office or station of the defendant, at Port Huron, for a ticket of passage from Port Huron to Battle Creek, a distance of 159¾ miles, and tendered therefor the sum of $3.20 in legal-tender money of the United States.

The money was refused, and the agent of the defendant company refused a ticket to plaintiff for such sum, which refusal the plaintiff avers was of damage to him, and brings suit.

The suit was commenced in the circuit court for the county
31 of St. Clair, and the plaintiff recovered judgment.

The circuit judge charged the jury as follows :

" I charge you, gentlemen, that by act No. 202 of the public acts of this State of 1889 all railroad corporations owning or operating railroads in this State, the gross earnings of whose passenger trains, as reported to the commissioner of railroads, for the year 1888 equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, were required to transport passengers at the rate of two cents per mile.

It is admitted that the defendant's earnings per mile, as reported to the commissioner, exceeded that sum.

It is claimed by the defendant that this law is unconstitutional and void; but I charge you the law is valid, and that under that law the defendant was bound to transport the plaintiff at the rate of two cents per mile, and for its refusal so to do the plaintiff may recover, and it — for you to assess his damages at such sum as you think him entitled to under all the circumstances, and such as will compensate him for the injury he is shown to have sustained."

It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the attorney general, when it was brought into this court upon writ of error, very properly interposed and secured counsel to represent the public interest.

In the stipulation of facts or in the taking of testimony in the court below neither the attorney general or any other person interested for or employed in the behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, under our view of the case, is not of material inquiry.

32 We are not informed what questions were raised in the court below, except that the constitutionality of the statute was attacked.

In this court it is urged that the legislature has no power to prescribe absolutely a maximum rate for passenger fares; that a railroad corporation is a common carrier and the legislature has no right to fix arbitrarily the limit of its charges.

It is admitted that the franchise and privilege conferred by the State upon these corporations to build, own, maintain, and operate a railroad, and the power also conferred to exercise the right of eminent domain in securing the right of way for the road and the right of locating the road-bed and tracks along and across public highways and other th-roughfares, clothes such railroad property with a semi-public character and subjects it to the control of the State in

regard to the compensation for its use to the extent that its charges must be reasonable, and that the legislature has the right as to such property to pass such reasonable rules and regulations as will accomplish that result.

But it is insisted that in its ownership it is private property, and the granting of these privileges does not take from the company its rights as owners to make and fix its own tariff of charges, but only requires, for the protection of the public, that such tariff shall be reasonable. Within the bounds of reasonableness the owner has full power and right to make such tariff.

Leaving out of view for the present the decisions of the Supreme Court of the United States upon this question, which will be considered hereafter (as this must be conceded to be in some of its phases a Federal question and controlled by such decisions, if applicable), we will examine our own constitution, policy, and laws as regards this subject.

33 This is the first time, we think, that the right of the State to control and fix the maximum rates of freight or passenger fares has been denied in Michigan.

The statute amended by the act under consideration provided that "the compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight 100 pounds, shall not, except on railroads operating less than 20 miles of road, exceed the following prices, viz: For a distance not exceeding five miles, four cents per mile; for all other distances not exceeding —, three cents per mile; and no fare shall be less than five cents, and that amount in any case may be charged and collected. * * * Provided that in the upper peninsula five cents per mile may be charged and collected on all railroads." * * *

Howell's Stat., subdiv. 9, sec. 3323, page 841.

The first general railroad law of the State provided that "the compensation for any passenger and his ordinary baggage shall not exceed three cents a mile unless by special act of the legislature, and shall be subject to alteration as hereinafter provided."

Session Laws of 1855, sub. 9, sec. 17, page 160.
C. L. 1857, vol. 1, p. 638.

In 1869 the legislature amended this subdivision so that the compensation on roads over 25 miles in length should not exceed three cents per mile; not over 25 miles in length, four cents.

S. L. 1869, p. 179.
C. L. 1871, 1 vol., p. 752.

In 1873, after the adoption of the constitutional amendment act 19 A, there was a general revision of the railroad laws. In that revision the rate was fixed as found in Howell's statute.

See S. L. of 1873, page 506.

Section 11 of article 5 of this revision provided that this act
34 might at any time be altered, amended, or repealed; but such

alteration, amendment, or repeal should not affect the rights of property of companies organized under it.

Laws of 1873, page 542.
Howell's Statute, sec. 3395.

It will thus be seen that the right of the legislature to fix the maximum rate for passenger fares has been exercised ever since the first general enactment as to railroads in 1855.

The defendant corporation holds its franchise and enjoys its privilege to do business in this State under this general railroad law, and for many years has acquiesced in the statute fixing the maximum rate of its passenger fares; nor has it, or any other road in the lower peninsula, complained of the distinction made in such law between such roads and the roads in the upper peninsula.

And in 1870 the people of the State amended the organic law, the constitution of the State, expressly conferring upon the legislature the power to fix such maximum rates.

"The legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad."

Art. 19 A, sec. 1.

This constitutional provision, beyond all doubt, authorizes the legislature to fix maximum rates with only one limitation, to wit, that such maximum rate shall be a reasonable one; and, in my opinion, the use of the *and* "different" authorizes the legislature not only in such legislation to classify the railroads, but to legis-
35 late differently for different railroads.

The argument, therefore, presented by the Hon. Wm. L. Webber, that the legislation under consideration is class legislation and therefore unconstitutional has no weight as against this express clause of the constitution as I construe it.

It must have been the intention of the legislature in submitting this article, as well as of the people in adopting it, to authorize any reasonable classification of railroads in this State for the purposes of fixing such rates. Not only is this the natural and logical interpretation of the meaning of the word "different" as used in said section one of the article, but, as shown by Mr. Webber in his argument, there can be no possible legislation on this subject which will not, if general and treating all railroads the same, operate unequally, and therefore be open to the charge that it benefits one class of railroads at the expense of other classes, and consequently will in effect be class legislation.

His argument is, by way of illustration, that if the Michigan Central trains should be limited to the charge of two cents per mile from Jackson to Mackinaw and from Saginaw to Detroit, it would, of necessity, compel the Grand Rapids and Indiana railroad to also carry

at two cents a mile from Mackinaw south, and the Flint and Pere Marquette railway to carry at the same rate from Saginaw to Detroit, because of the competition between the roads running in the same direction and to the same places, and says: "This is class legislation of the worst character." Or, he says, "take a more striking illustration, Why should the Michigan Central R'y Co. be limited to two cents a mile" (its gross earnings being over $3,000 to the mile), "the D., G. H. & M. R'y be limited to 2½ cents per mile, & the D., L. & Northern be permitted to charge 3 cents per
36 mile between Grand Rapids and Detroit?"

It is made apparent by his own argument that the general law existing before the amendment of 1889, fixing the maximum rate on all roads in the lower peninsula without classifying them, was also subject to the objection that he makes against the present law as class legislation because it operated unequally; for if fixing the rate at two cents upon one class of roads would force, as claimed by Mr. Webber, competing ro-ds whose gross earnings did not reach $3,000 per mile of necessity to also reduce their rates to two cents, thus operating unequally and being legislation benefitting one class more than another or hurting one class more than another, and, therefore, as he deduces class legislation, then a three-cent rate applied to all the railroads is open to the same objection; for if it is unfair and unequal to force all the railroads to a two-cent rate because some can better afford to so limit their charges than others, then it is unfair and unequal, for the same reason, to force a general limit of three or any other number of cents per mile; and this inequality and injustice exists just the same under a general law as it does when forced by the necessities of competition.

In fact Mr. Webber's whole argument makes it clear that no general law can be passed fixing the maximum rates on all roads alike, without reference to cost of construction or service, the amount of their business or income and their indebtedness, which will not give some roads undue advantage over others. See also R'y Co. *vs.* Iowa, 94 U. S., at page 164.

Therefore, it seems to me, the legislature in submitting and the people in adopting this amendment, knowing that all general legislation in this regard must in its consequences operate in a certain sense as class legislation, wisely used the word "different"
37 to signify, as it naturally does, that the legislature in this matter was granted power to make distinctions in legislation between the different railroads of this State, if such distinctions are reasonably made.

And the distinction between the roads of the upper and lower peninsula must be considered, in the absence of any showing to the contrary, to be a reasonable one.

We are authorized to take judicial knowledge, for it is a matter of general knowledge, that the cost of building and running railroads in the upper peninsula is much greater than that in the lower, owing to the marked physical difference between them in the character and face of the country.

This distinction has been carried in the railroad law of the State for over seventeen years, and distinctions in the legislature upon many matters between the two peninsulas have been constant and frequent ever since the upper peninsula has been a part of Michigan.

And the constitution of 1850 provides differently for the two sections of the State in regard to what the legislature may do as to pay of its members from the upper peninsula. Art. 4, sec. 15.

It provides also for a different disposition of the specific taxes from mining companies in the upper peninsula from other specific State taxes. Art. 14, sec. 1; art. 19, sec. 7.

This portion of the State is also treated by itself in art. 19 and provisions there made as to its courts and other matters.

It is true that article 15, sec. 1, of the constitution of 1850 prohibits the formation of any corporation in this State, except for municipal purposes, by any other than general laws.

And this provision of the constitution was no doubt right-
38 fully interpreted by this court in Nelson *vs.* McArthur, 38 Mich., 207, where it is said that "the great purpose of this provision was to introduce a system of legislation in regard to the institution of corporations, which would exclude the corruption and party favoritism which had too often accompanied the method previously in vogue, and to secure as far as practicable for all the people of the State an equality of opportunity and a guard against sectional discriminations."

But the amendment known as sec. 1 of art. 19 A was adopted in 1870, and must be considered as qualifying and modifying the letter as well as the spirit of art. 15, sec. 1, as regards legislation fixing the maximum of freight and passenger rates.

It therefore follows, in my view of sec. 1, art. 19 A, of the constitution, that the legislature had not only the power to make the distinction it did as to the two peninsulas of our State, but to classify the "different" railroads upon the basis of their gross earnings.

But in regard to the latter classification we are not without light from our own and other courts. In the first place, all roads earning the same amount per mile are treated alike, and there is therefore no distinction between them, if the gross earnings of the railroad furnishes a proper and reasonable basis for legislation of this character. Mr. Meddaugh, of counsel for the defendant, in his brief makes no complaint against the right of the legislature to make this classification, if they have the right to legislate at all upon the subject, and in arguing against the constitutionality of the distinction between roads in the upper and lower peninsula says in his brief:

"There is no excuse for confusing in the mind the power of the
State to classify all railroads for passenger and freight rate
39 purposes, with reference to their earnings, with that of making a territorial division of the roads for the same purpose, for the two are essentially dissimilar in character. By the former all roads similarly circumstanced in respect of earnings are treated alike, while by the latter they may be, as here, treated very unlike. It is this distinction that lies at the very foundation and constitutes

the reason of the constitutional provision and the constitutional principle I am urging against this act."

Mr. Kirchner, also of counsel for the defendant, argues that the act is not reasonable because based upon the gross earnings regardless of its operating expenses, when the operating expenses, although they did not do so in 1888, may in the future years exceed the gross receipts.

Mr. Webber, not of counsel, but who, on his request, was permitted to file a brief in the case, objects to the classification of roads in reference to their gross earnings on the ground that there are no reasonable maximum rates contemplated in this classification. It does not purport to be based upon the theory that railroad companies have earned more than reasonable compensation. Such a classification is purely arbitrary; he claims "it has no relation to the cost of service; it is immaterial whether the road cost $20,000 per mile or $40,000 per mile; it is immaterial whether their terminal facilities have cost millions of dollars to the railroad companies or hundreds only. These questions are all ignored; and without reference to whether the income of the past has been such as to enable the company to pay its interest or whether the balance is on the wrong side of the ledger, it fixes the limitation purely with reference to the gross income from passenger trains without reference to cost of service."

It seems to me that a classification according to gross earnings is the fairest and most reasonable method of classification.

Why should a corporation which is more economical than another in the matter of expenses be at a disadvantage in the law over one that is extravagant? And why should a corporation out of debt be adjudged entitled to charge less for its services than one heavily in debt?

As was well said on the argument, it would be a strange ordinance of a city that would regulate the amount of fare to be charged by a hackman by the cost of his team and carriage, and take into consideration the debts he owed and the interest that he was paying.

And yet, if railroads are to be regulated or controlled in the matter of fares by the legislature, upon what principle must they be classified in accordance with their net earnings and their indebtedness taken into consideration, which does not govern also the imposition of rates upon hackmen? One is a common carrier as well as the other; both may be said to have privileges granted them by the Government which authorize a reasonable regulation of their charges, but the privileges of a hackman sink into insignificance when compared with the franchise and privileges granted to railroad corporations; and yet no one has ever contended that a hackman could interpose the cost of his team or carriage or his indebtedness upon them against the reasonableness of the restriction of his charges.

A classification according to the amount of business done per mile seeems to me to be the fairest and the most reasonable classification, if railroads are to be classed at all, in the fixing of the maximum rates; and this method of classification is not unusual, and has been sustained in a variety of cases.

A law classifying railroads for taxing purposes according to their income was held constitutional in Railroad Co. *vs.* Gibbs, 4
41 S. E. R., 49 (S. C.).

A law classifying business for taxing purposes is constitutianal.

Singer Man. Co. *vs.* Wright, 33 Fed. R., 121.

A law classifying insurance companies for taxation according to the premiums received was held valid in State *vs.* Liverpool L. & G. Insurance Co., 4 South. R. (La.), 504.

In Wolcott *vs.* People, 17 Mich., 68, it was held that the legislature had the power to tax the business of an individual engaged in carrying express according to the gross earnings of the business.

Mr. Justice Campbell dissented upon the ground that sections 11 and 12 of the article of the constitution on finance and taxation declare that "the legislature shall provide a uniform rule of taxation, except on property paying specific taxes," and that "all assessments hereafter authorized shall be on property at its cash value," and that the constitution pointing out the cases in which specific taxes might be levied, which did not include the case in hand, such taxation was therefore forbidden by the constitution in the case then at bar. There is, however, no intimation in such dissenting opinion that such a listing for taxation was unjust or unreasonable.

In Youngblood *vs.* Sexton, 32 Mich., 414, involving the constitutionality of the liquor law of 1875, the validity of the tax was assailed on the ground that it was not levied on any principle of equality or uniformity, and therefore was wanting in one of the essential elements of taxation under our constitution. Mr. Justice Cooley, in disposing of this point, said: "If the precise point here is that the tax is unequal and unjust because it is not levied in proportion to the business done, then the objection is with-
42 out force. It may possibly be true that an apportionment according to the business done would have been more just, but a question of this nature concerns the legislature and not us. Courts cannot annul tax laws because of their operating unequally or unjustly. If they could, they might defeat all taxation whatsoever, for there never yet was a tax law that was not more or less unequal and unjust in its practical workings."

The same may be said here. There can be no classification of railroads for the purposes of fixing maximum rates or carriage but what will operate more or less unequally upon different railroads and be unjust to some of them so classified. To argue that the legislature cannot make any classification which operates unequally is to argue that the legislature can make no classification at all, and if no classification can be made and the maximum rate must be fixed the same for all, then the law is admitted to operate unequally and unjustly, because some companies are to less expense than others in the same length of road by reason of the nature of the country through which they run. Some have costly terminal facilities and some have not; some owe large amounts and some do not, and some do a large amount of business and some do not.

The matter then resolves itself to this, which is, in fact, the main argument to which all these collateral lines of discussion by the defendant's counsel run and connect, that the legislature has absolutely no power to interfere with or regulate the fixing of tolls by the railroad companies of this State.

This view of the case, however, cannot be considered in the light of our constitution as heretofore shown.

The legislature of Iowa in 1874 enacted as follows: "All railroads in this State shall be classified according to the gross
43 amount of their respective an-ual earnings within this State per mile for the preceding year, as follows: Class A shall include all whose gross annual earnings per mile shall be $4,000 or more; class B, those whose gross annual earnings per mile shall be more than $3,000 and less than $4,000, and class C those whose earnings shall be less than $3,000 per mile."

The statute also provided that railroads in class A should charge not to exceed 3 cents per mile, class B not to exceed 3½ cents per mile, and class C not to exceed four cents per mile.

The constitution of Iowa provides, what ours does not, that "all laws of a general nature shall have a uniform operation."

The case went to the Supreme Court of the United States and is found in 94 U. S., 155 (Chicago, Burlington & Quincy R. R. Co. *vs.* Iowa).

It was held, in spite of this constitutional provision and also of another, to wit, "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens," that this legislation was valid.

The court said: "The statute divides the railroads of the State into classes according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the constitution requires."

This latter clause of the Iowa constitution is not found in ours, neither did the constitution of that State directly authorize the passage of laws fixing maximum rates, as does ours in article 19 A.

The statutes of Arkansas fixed the passenger rate on lines of railroad 15 miles or less in length — 8 cents per mile; fifteen
44 and less than 75 in length, 5 cents, and on lines over 75 miles in length, 3 cents. In Dow *vs.* Bidleman, 125 U. S., 160, the Supreme Court of the United States upheld this legislation and said:

"The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried or of gross or net earnings during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

The Iowa case was cited and approved.

It was shown in Dow *vs.* Beidleman that the cost of construction of the railroad was $4,000,000, and that the company's indebtedness, bonded, was $2,850,000. The net income for 1886 was $162,000, earned principally from passenger traffic at 5 cents per mile. The law under consideration would reduce such net income to $58,000. But it is contended that the reasonableness of such a classification was not raised before or determined by the Supreme Court of the United States in any of these cases, but simply the power of the legislature under the different State constitutions to do so; but if this is so, we are then left to interput our own constitution and the Federal Constitution without the light of that court upon the subject. As has been already said, I think the classification adopted a fair and reasonable one, nor does it appear to me to conflict, if reasonable, with the provision of the State and National Constitu-
45 tion that no person "shall be deprived of property without due process of law."

But in Dow *vs.* Beidleman, *supra*, it was claimed that the legislation there under consideration would reduce the net income so that the company would be able to pay less than one and one-half per cent. on the cost of its road without paying any interest on the bonded debt. If it was applied on the interest of such debt, which was bearing interest at 8 per cent., it could only pay a little over two per cent. upon such debt.

This seems to have raised the question of reasonableness.

But the court said, and the opinion was not dissented from by any member of the court: "The plaintiffs do not contend that it is always or generally unreasonable to restrict the rate of carrying each passenger to three cents a mile. They argue that it is so from the admitted fact that with the same traffic that their road has now and charging for transportation at the rate of three cents per mile, the net yearly income would pay less than one and a half per cent. on the original cost of the road, and only a little more than two per cent. on the amount of its bonded debt; but there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road or the amount of outstanding bonded indebtedness.

"Without any proof of the sum invested by the reorganized corporation or its trustees the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable; still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of
46 law."

Dow *vs.* Beidleman, 125 U. S., 690, 691.

The conclusion, then, is that the legislature has the power, under the constitutional provision contained in article 19 A, and also in-

dependently of it, as shown by the cases cited, to classify the railroads of this State as it has according to the amount of business done and also as to their location on the upper and lower peninsula.

Another contention is that this legislation is invalid because it violates the contract which was entered into between the State and this railroad corporation when it organized under the general laws of this State. Mr. Meddaugh in his brief says:

"Railroad corporations organized under general laws of Michigan take their being under an implied contract that the State shall not reduce their tariff of passenger and freight rates, either in the exercise of its common-law powers or the constitutionally-reserved power to repeal, alter, or amend so as to deprive these corporations of the ability to earn a reasonable profit on the capital invested, and the act in question clearly violates this principle."

The defendant corporation, as appears by its own bill of complaint filed in this court in Chicago & G. T. R'y Co. *vs.* Turner, 44 N. W. R., 174, was incorporated under our laws by the consolidation of different railroads. This consolidation and incorporation took place after the adoption of article 19 A, to wit, as shown by its report to the railroad commissioner April 1, 1880. The companies thus consolidated were five, three of whom had lines within this State, to wit, Michigan Railway Co. of Michigan, running from Mich. & Ind. State line to Lansing, Mich., incorporated January 7, 1880; Chicago & Northeastern R'y Co., running from Lan-
47 sing to Flint, incorporated August 12, 1874; Northwestern Grand Trunk of Michigan R'y Co., running from Flint to Port Huron, incorporated August 26, 1879.

Each one of these, it will be seen, was also incorporated after the constitutional enactment, and also subsequent to the general revision of 1873.

It is claimed by Mr. Webber in his brief that the proper construction of the phraseology of the statute under consideration does not "subdivide the railroads of Michigan in accordance with the original charters under which the roads were constructed. It applies to railroad companies operating passenger trains. It does not apply to railroad companies not operating passenger trains. To illustrate: The Grand River division of the Michigan Central railroad was built under a special charter as the 'Grand River Valley Company;' yet the Grand River Valley Railroad Company operates no passenger trains and makes no report of passenger earnings. The road is operated by the Michigan Central Railroad Company, and the Michigan Central Railroad Company reports the passenger earnings for this road, and it is the Michigan Central Railroad Company, as to the mileage of this division, which is the company 'whose passenger trains reported as aforesaid' earn the money."

"Every railroad in the State having now any considerable mileage is made by a union of companies—that is, different portions of the road were constructed under separate and different charters, but the ownership of the passenger trains and the practical ownership and control of the railroad is vested in the company which operates it, and this law under consideration, when it says 'all companies

the gross earnings of whose passenger trains as reported to
48 the commissioner of railroads,' must have reference to the companies operating the railroads, and it cannot be held to apply separately to each particular corporation, whether general or special, by authority of which the road was originally constructed."

I think this construction is the correct one. Consequently this defendant, The Chicago & Grand Trunk Railway Company, must stand upon its own incorporation in this State. The law is aimed at it and not at the separate corporations which it has absorbed and which no longer exist, as far as this statute is concerned.

Therefore when it came under the provision of our laws, and accepted the privilege of doing business in this State, it came in under a constitution expressly authorizing the legislature to alter the rates, with only the limitation that all legislation in such direction should be reasonable. This ends the question as to the violation of any contract, implied or otherwise.

The constitution prevails, and as long as such provision remains therein I deny the right of our legislature to expressly or impliedly contract away the right of the people, through another legislature, to enforce this provision of the constitution by such legislation as to them may seem proper, provided it is reasonable.

This view renders it unnecessary to discuss what might have been the rights of the defendant had it been organized and operating passenger trains in this State before the adoption of this article of the constitution.

The right of the legislature to fix the maximum charges of rates upon railroads, if such rates are reasonable, under the Federal Constitution has been frequently sustained by the United States Supreme Court.

Munn *vs.* Illinois, 94 U. S., 113.
C., B. & Q. R. R. Co. *vs.* Iowa, 94 U. S., 155.
49 Peck *vs.* N. W. R. R. Co., 94 U. S., 164.
C., M. & St. P. R. R. Co. *vs.* Ackley, 94 U. S., 179.
Ruggles *vs.* Illinois, 108 U. S., 526.
Stone *vs.* Farmers' L. & T. Co., 116 U. S., 307.
Dow *vs.* Beidleman, 125 U. S., 680.
Georgia R. R. Co. *vs.* Smith, 128 U. S., 174.
C., M. & St. P. R. R. Co. *vs.* Minn., 10 S. E. R., 462.

I shall not attempt to analyze these decisions separately.

This has been well done by the briefs on both sides. It is probably true that there has been some fluctuations in the opinions in the different cases, but the power of the legislature to reasonably regulate and control railroads as to their carrying rates has not been denied in any of them, and has, in my opinion, been lately affirmed in the case of the Chicago, Milwaukee & St. Paul Railway Co. *vs.* The State of Minnesota, decided March 24, 1890.

The majority opinion in the case of Munn *vs.* Illinois, the first of the series, hold that the reasonableness of such legislation is a question for the legislature to decide and not for the courts. At page 133 the chief justice says :

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise. In countries where the common law prevails it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances or perhaps, more properly speaking, to fix a maximum, beyond which any charge made would be unreasonable. Undoubtedly in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascer-
50 tained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists the right to establish the maximum of charges as one of the means of regulations is implied. In fact the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price; without it the owner could make his rates at will and compel the public to yield to his terms or forego the use.

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the change of time and circumstances. To limit the rate of charge for services rendered in a public employment or for the use of property in which the public has an interest is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

Justice Field, now on the bench, dissented.

This same doctrine seems to have been affirmed in the Iowa case, 94 U. S., 156, and the Peik case, 94 U. S., 164.

There is nothing in any of the other cases in conflict with
51 the idea that the reasonableness of the legislative enactment was to be determined by the legislature until we reached the case of Stone *vs.* Farmers' Loan & Trust Co., reported in 116 U. S., 307.

The State of Mississippi in 1884 passed an act to provide for the regulation of freight and passenger rates and created a commission to supervise and fix the same instead of doing it directly.

The commission was authorized to revise the tariffs of the companies, but with a view to "the character and nature of the services

performed" and so as to "allow a fair and just return on the value of such railroads."

It will be seen that this act made the value of the road a material factor in determining the rates by the commission.

The commission was empowered to receive complaints, cite companies to answer, listen to evidence and arguments, and determine the rates to be charged.

By the statute the determination of the commission was to be received by all courts as *prima facie* evidence that such determination was right and proper. See 116 U. S., 312.

In the opinion of the court Chief Justice Waite cites Munn *vs.* Illinois, 94 U. S., 113, and the Iowa case, 94 U. S. 156, and says that it was decided in those cases "that as to natural persons and corporations subject to legislative control the State could, in cases like this, fix a maximum, beyond which any charge would be unreasonable, and that such maximum when fixed would be binding on the courts in their adjudications as well as on the parties in their dealings." See 116 U. S., p. 330.

But the court, in still further speaking on the subject, said:

"This power to regulate is not a power to destroy, and limitation is not the equivalent to confiscation. Under pretense of regulating fares and freights the State cannot require railroad corporations to carry persons and property without reward; neither
52 can it do that which in the law amounts to a taking of private property for public use without just compensation or without due process of law."

This is made the text for the decision in the Minnesota case of March 24th, 1890, and it is contended by the counsel for the defendant that this last case, reported in 10 Supreme Court Rep., 462, has virtually overruled all the preceding ones and practically taken away from the legislature not only the power to determine the reasonableness of the maximum rate it fixes, but the authority to fix any such rate at all.

There is certainly nothing in the decision denying the authority of the legislature to establish maximum rates. We have been presented with the brief of John W. Carey, Esq., of Milwaukee, counsel for the railroad company, filed in the case, in which he takes strong ground denying that the legislature of Minnesota is authorized to fix by positive law the rates and charges for the transportation of persons and property over lines of railway owned by the defendant company, and holds that under the Constitution of the United States it is the right of the company to make, fix, and establish its rates and charges over its railway, subject only to the provision that such rates and charges shall be fair, just, and reasonable.

He admits the right of the legislature to fix rates which may govern railroads organized after such legislation, but denies the right of such body to fix the compensation of existing railroads or other like property, and claims that prior to the legislation in Illinois in 1873 and in Iowa, Wisconsin, and Minnesota in 1874 there was no authority for the exercise of such legislation anywhere, either in English or American jurisprudence or legislation. He

attacks the case of Munn *vs.* Illinois and all the cases following it as unsound and unjust, and insists that the first-named case is not sustained by the authorities cited by Chief Justice Waite to support it.

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He further says: "We deny that it is a legislative function to adjudicate and determine what are reasonable rates." The question as to whether a given rate is reasonable and fair when challenged is for the judiciary.

Hence, contending that it is the exclusive right of the railroad companies to fix their rates, limited only by the condition that they shall be fair and just, and, when challenged, it being a question for the courts alone to determine, he deduces that the legislature has no right to fix or establish a maximum rate at all, and the court is distinctly asked to reverse and overrule its previous decisions to the contrary.

But it did not do so. It would indeed have been a singular action upon the part of the court of very last resort in this country to have overruled a long line of decisions upon a matter conceded to be of the highest importance to the whole people by implication and without alluding to the previous opinions of the court, especially when such reversal was expressly demanded in the argument of the case.

But, in my opinion, we are not left in the dark by this latest decision upon this question. Mr. Justice Blatchford, in speaking for the court, in answer to the argument that a contract existed that the company should have the power of regulating its rates of toll by its charter, and that any legislation by the State infringing upon that right impairs the obligation of that contract, and that there was no provision in the charter or in the general statute reserving to the State or Territory the right to alter or amend the charter, and that no subsequent legislation of the Territory or State could deprive the directors of the company of the power to fix its tolls, subject only to the general provision of law that such rates should be reasonable, says:

54

"But we are of the opinion that the general language of the 9th section of the charter * * * cannot be held to constitute an irrepealable contract with that company that it should have the right for all future time to prescribe its rates of toll free from all control by the legislature of the State.

"It was held by this court in Pennsylvania Railroad Co. *vs.* Miller, 132 U. S., 75, in accordance with a long course of decisions both in the State courts and in this court, that a railroad takes its charter containing a kindred provision with that in question, subject to the general law of the State and to such changes as may be made in such general law and subject to future constitutional provisions and future general legislation in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject-matter involved, and that exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is

given expressly or unless it follows by an implication equally clear with express words." * * *

"In Stone *vs.* Farmers' Loan & Trust Co. (116 U. S., 307, 325) the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at that the right of a State reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant or words equivalent in law, and that a statute which grants to a railroad company the right, from time to time,
55 to fix, regulate, and receive the tolls and charges by them to be received for transportation does not deprive the State of its powers, within the limits of its general authority as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated." But after reaching this conclusion the court said (p. 331): "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limitation. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freight the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

"There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid."

The case was presented to the courts in this way. The legislature of Minnesota created a railroad and warehouse commission, consisting of three persons, appointed by the governor and confirmed by the Senate. The statute in relation to this commission and regulating common carriers provides that "all charges made by any common carrier * * * for any service rendered or to be rendered in the transportation of persons or property * * * shall be equal and reasonable, and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful."

56 If the commission find at any time that any of such charges are unequal or unreasonable it is granted power and is authorized and directed to compel any common carrier to charge the same and adopt such charge as the commission "shall declare to be equal and reasonable."

Upon complaint that certain charges of the defendant company for conveying milk were unequal and unreasonable the commission proceeded to investigate, and found that such charges were unequal and unreasonable, and declared that a rate of 2½ cents per gallon in ten-gallon cans was an equal and reasonable rate for such service. The company were charging and receiving 3 cents per gallon for the transportation.

The commission thereupon directed the defendant company to

carry the milk for 2½ cents per gallon. The company refused to comply with this direction.

The commission, through the attorney general, then made application to the supreme court of Minnesota for a writ of mandamus to compel the company to obey the direction.

The company returned to the alternative writ, which was issued by the court, certain constitutional objections, and also that the rate of 3 cents per gallon was a reasonable, fair, and just rate, and that the rate fixed by the commission was not a reasonable, fair, or just compensation to the company for the service rendered, and that the establishing of such rate by the commission against the will of the company was, *pro tanto*, a taking of its property without due process of law.

Upon the hearing the court refused to take testimony on the issue as to whether the rate fixed by the commission was reasonable, fair, and just, and issued a peremptory writ.

The Minnesota supreme court held that the intention of
57 the legislature was not that the rates fixed by the commission should be merely *prima facie* equal and unreasonable, but final and conclusive as to what are lawful or equal and reasonable charges. The court held that there was, therefore, no fact to traverse except the violation of the law in refusing compliance with the recommendation of the commission.

This is a brief but substantial statement of the case.

The Supreme Court of the United States, holding that they must accept this construction of the statutes by the State court as conclusive, was of the opinion that, so construed, it was in conflict with the Constitution of the United States, in that it deprived "the company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

The court further says: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery it is deprived of the lawful use of its property and this, in substance and effect, of the property itself without due process of law and in violation of the
Constitution of the United States, and in so far as it is thus
58 deprived while other persons are permitted to receive reasonable profits upon their invested capital the company is deprived of the equal protection of the laws."

This is the whole substance of the decision. It will be noticed that the court does not, except by implication from the language

last above quoted, deny the right of the legislature itself to determine the reasonableness of the rates of which it may fix the maximum. Munn *vs.* Illinois and the other cases are not expressly overruled in this regard.

And the case still holds to the doctrine that the State may fix such maximum rates, and at best can only be claimed to decide that when the fixing of such rate is delegated to a commission and the reasonableness of the rate fixed by such commission is attacked the question of such reasonableness is one to be determined by the courts.

And it is evident that the court held also that it was competent for the legislature to create this commission and that such commission had power to fix rates, provided such rates were equal and reasonable, as the opinion concludes as follows: "In view of the opinion delivered by that court" (supreme court of Minnesota), "it may be impossible for any further proceedings to be taken other than to dismiss the proceedings for a mandamus. If the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission, still the question will be open for review."

An order was accordingly made, thus intimating clearly that, if upon judicial investigation the rates fixed by the commission should be found equal and reasonable, the commission should be
59 sustained in its finding and direction.

Upon an examination of the facts and the opinion in this Minnesota case and the cases heretofore cited, beginning with Munn *vs.* Illinois, it is clear to us that the Supreme Court of the United States has not overruled the case of Munn *vs.* Illinois and the others following it and cited in this opinion, and that the decision in the Minnesota case rests not on the right of the legislature to declare what is a reasonable maximum rate, but upon its right to authorize a commission to do so. The substance of this last decision is that whether or not the rates established by such commission are reasonable is a question for the courts and not for the commission to determine, as such commission has no means or power to carry on an investigation and "cannot, in view of the powers conceded it by the State court, be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

There is a vast difference between the action and authority of a commission appointed by the legislature and the action and authority of the legislature itself—the sovereign law-making power of the State.

There are many things that a legislature can do that it cannot delegate to any other body, and it would seem, in the opinion of the Supreme Court of the United States, that this is one of them; and now to the case in hand. The constitution of this State, enacted, as before said, before the organization of this defendant corporation, has given the legislature power to from time to time pass laws establishing reasonable maximum rates of charges for railroad transportation.

Who is to judge of the reasonableness of such legislation of the

rates so fixed? Is it to be decided by the courts, not only
60 upon each separate act of the legislature, but also in the case of every railroad company, and also in the case of every person who brings suit for a violation of the law against such company? If so, the courts will not fail of business, nor will the result of a determination of facts by juries, to which the court must apply the law of reasonableness, be always harmonious or consistent. For instance, a railroad company at the suit of one person may establish that a certain rate is unreasonable and at the suit of another person the same rate may be determined to be reasonable. The question will ever be open and never closed. The result of such investigation may be different at one time then it might at another, as the facts generally and commonly understood to enter into the reasonableness of a given rate are liable to change each year and perhaps each quarter of the year. The result will always be shifting and uncertain and the determination in one suit will not bind in another unless the parties are the same.

We think the intention of the people in this constitutional enactment was to authorize the fixing of reasonable maximum rates exclusively by the legislature. Then the result is certain and definite. The law is known and there is no necessity for litigation, and there can be no different determination in like cases.

If injustice shall be done by the legislature the remedy lies in the good sense of the people and not in the court. It would not be proper for this court to presume that the people intended by the use of the word "reasonable" in this constitutional provision to authorize the courts to determine that which they have by such constitu-
tion solemnly committed to the legislature. It would be to
61 presume that they intended to grant, in fact, the establishing of these rates to the courts instead of to the legislature, because if it is for the courts to declare what is reasonable the courts, in effect, fix the rates in the end. In this view of the case the circuit judge was right in *its* judgment, and the same is affirmed with costs.

A. B. MORSE.
J. W. CHAMPLIN.
CHAS. D. LONG.

I concur in the result under the rule of *stare decisis*, regarding the question as settled by the decisions of the Supreme Court of the United States referred to in the opinion of my brother Morse.

C. B. GRANT.

62 I concur with my brother Morse in the result reached in this case. The importance of the questions involved will justify me in stating some additional reasons that have occurred to me as supporting the position the court has taken, that the right to establish reasonable maximum rates of charges for the transportation of passengers and freight by railroads is under our constitution vested in the legislature, from whose judgment, as expressed in laws legally enacted, there is no appeal except to the people.

I should entertain this view independent of the constitutional amendment of 1870 (const., art. XIXa). Section 1, article XV, of the constitution, authorizing the formation of corporations under general laws, provides that all such laws may be altered, amended, or repealed. The defendant accepted the charter under a general law passed in pursuance of this constitutional power. Under such law and charter it has availed itself of the extraordinary power of exercising the right of eminent domain and to occupy for its uses the public highways of the State. The acceptance of a charter on such terms as were prescribed by the constitution and laws and the acquisition of important property rights and franchises by virtue of powers therein granted amounted to a consent on its part to legislative control. In so far as its property is affected by it, it is by its own act of consent and not by "due process of law." There is, in my opinion, no need under our constitution to base the right of legislative control of railroads upon any presumed dedication of their property to public use growing out of the interest which the public has in such property and the manner of its use. That
63 presumption has been held sufficient to support such right by the Supreme Court of the United States in the Granger cases—Munn *v.* Illinois, 4 Otto, 113–126. In this State a railroad company needs to make no dedication of its property to public use, because it takes its property and franchises in the beginning charged with the encumbrance of legislative control. When it acquires life it by the same act submits to limitations. This creature of the law consents to be born and to assume its functions knowing that its life and fortune are entrusted to the discretion of its creator.

It is not contended by counsel for defendant that the State has no control over the rates of charges it shall make for the carriage of passengers. It is conceded that it can be required to charge only reasonable rates; but it is contended that the determination of what is reasonable is a judicial and not a legislative function. Under our constitution it is the legislature that has power to create corporations and have them under control. No such power is vested in the judiciary in any sense different from that it has over natural persons, nor is there anything in the power to be exercised that is essentially judicial. So far as the right has been exercised to regulate the charges of trucks and drays in cities, of wharf-s, turnpikes, bridges, canals, grain elevators, ferries, and mills, the rates of interest for the use of money—and it has been exercised in all countries so long "that the memory of man runneth not to the contrary"—it has been done by legislation, and I know of no case when the matter has been referred to the courts. The legislature has peculiar advantages for arriving at a correct judgment as to what charges are reasonable not possessed by the courts. A correct judgment can only be formed or approximated after a careful study of many facts
64 concerning the cost of building and operating a road, the extent of its business and earnings. The legislature can and has provided the machinery for collecting this information through the commissioner of railroads. (Laws of 1873, act 79.) The courts have no means of accumulating this information. If anything were

needed to demonstrate that the question of the reasonableness of rates of fares was legislative rather than judicial, the record in this case would go far toward doing so. The plaintiff claims to have been injured to the extent of $1.60. To redress this grievance he brought this suit, and the defendant's position is that it has the right to show that the fare tendered was unreasonable in amount, reference being had to all the facts that must affect the question. If the contention of the defendant be admitted, and the question of reasonableness be tried and determined by the court, nothing is settled by it except the question of the plaintiff's right to the small sum claimed as damages. No principle is or can be settled in this suit that will necessarily govern in other suits of a similar character, because the facts and circumstances that affect the cases may and usually must be somewhat different. In a court of law every case must stand upon its own facts, and neither party to a suit can be concluded by the judgment in a former suit to which they were neither parties nor privies. If, then, the reasonableness of a fare is a judicial question, to be settled only in a suit at law by the person aggrieved, the public is practically without remedy, as the costs and expenses of the litigation must inevitably exceed any possible recovery. It may be said with some force that this circumstance ought not to control or have much weight in determining a question of right; but, keeping in view the admitted fact that the power of control must
65 rest somewhere, the practical facilities on the one hand and difficulties on the other are considerations that might properly have weight with those who were settling, in the formation of a constitution, a method of governmental control, nor do I think that the constitutional amendment of 1876, before cited, which expressly provides that "the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State" is more than declaratory of a power that already existed. The argument that the use of the word reasonable in the amendment makes a judicial question out of what was without it a legislative question seems to me to be without force. The amendment of 1870 was neither a grant nor a limitation of power. It was a declaration of power already reserved in the constitution, and the amendment served only to put beyond question the right of the legislature which was before thought to be open to debate. It would be little short of usurpation, it seems to me, for the courts to assume to determine for the legislature a question which the constitution has solemnly committed to it. The use of the word "reasonable" may as well be regarded as an admonition to the legislature as to the courts, and it cannot be assumed that the admonitions of the constitution will be more sacredly regarded by one branch of the Government than another. It seems to be considered by those who argue against legislative control that to concede the power to regulate carries with it the power to destroy. As a question of abstract power this may be true, but it is not truer of legislative than of judicial control. Concede the power, and its abuse is possible. "All power is subject to abuse, and if this circumstance

is to be taken as an argument against its existence, we are irresistibly driven to results fatal to all government. * * *
66 All human agencies are fallible, and the wisdom of man has never been able and never will be able to devise a system of government incapable of abuse. Every department may exceed its authority or pervert its powers. The judiciary has no pre-eminent claim to infallibility." Graves, J., in People *v.* Salem, 20 Mich., 503.

In my opinion, the fear of spoliation by the legislature is without foundation. That there is a desire on the part of the people to act fairly and to deal justly by the railroads is evidenced by the fact that at considerable cost they have established a bureau for the collection of the information absolutely necessary to the formation of a just judgment. That the legislature may make mistakes is probable; that it may act unjustly in a given case is possible, but that it will in the end pursue a course calculated to cripple or destroy the railroads, those great arteries of trade on which the commercial life of the people depends, is as unlikely as that a reasonable man will commit suicide.

As evidence that the right to fix the rate of charges for the transportation of passengers and freight by railroads belongs to the legislature and not to the courts, I call attention to the fact that the power has been exercised by the legislature from the earliest history of the State. The Michigan Central charter, granted by special act in 1846, provided that the rate for passenger fares should not exceed three cents per mile, and for freight the charges were not to be greater than those upon certain New England roads named. (Sec. 14, act 42, Laws 1846.)

The Michigan Southern charter limited the right of the company to such charges as were authorized by the State to be taken on the 1st day of January, 1846. (Laws of 1846, act 113, sec. 15.)

The first general railroad law, passed in 1855, contained
67 an express limitation upon the charges that should be made by companies organized under it for the transportation of passengers and freight. (Laws of 1855, sec. 17, par. 9, p. 153; see also Revision of Railroad Laws, Laws of 1871, p. 328, sec. 10, par. 9; Laws of 1873, p. 506, sec. 9, par. 9; Laws of 1877, p. 186, sec. 9, par. 9.)

The rates of charges as fixed by those several acts, when we consider the cost of railroad construction and maintenance, the extent of the business transacted, and the earnings then as compared with the present, were lower than the rates fixed by the act of 1889, and yet not only was the right of the legislature to fix such rates not contested, but the reasonableness of the rates fixed was unquestioned.

No more important question than that involved here has, in my judgment, been before this court. The issue is clearly made up, and we are to determine, perhaps for all time, the power of the State over the railroads built under the sanction of its laws. There are candid and thoughtful men—men who love justice and hate oppression—who fear for the result if this great public interest is given

over to legislative control freed from any judicial supervision. I do not join in those fears, but if I did I could not change my views of the power which the constitution has vested in the legislature over this subject.

A legislator who, in the exercise of this great power committed to him by the constitution, suffers himself to be influenced by any motive except a desire to deal justly between the people and those who by putting their fortunes into the railroads have enriched
68 and made prosperous our commonwealth is an enemy of the State and unworthy of citizenship in it.

EDWARD CAHILL.

69 To the Honorable David J. Brewer, associate justice of the Supreme Court of the United States:

Pursuant to section 2 of the act of Congress approved February 5, 1867, entitled "An act to amend an act to establish the judicial courts of the United States, &c.," your petitioner, The Chicago & Grand Trunk Railway Company, hereby petitions you for an allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Michigan in the cause hereinafter mentioned.

Your petitioner respectfully represents—

First. That it is a corporation under the laws of the States of Michigan, Indiana, and Illinois, and was organized April 1, 1880, by consolidation of various corporations theretofore existing, two of which corporations were organized and existing under the laws of Michigan, which provide generally for the organization of railroad companies, about the year 1869 and earlier.

Second. That on the 28th day of June, 1889, your petitioner owned and operated a line of railway between the city of Port Huron, Michigan, and the city of Chicago, Illinois, and which passed through the city of Battle Creek, Michigan, being in all about 335 miles in length, as it had done since said 1st day of April, 1880.

Third. At the time of the creation of your petitioner and of the Michigan corporations merged in it—three in all—the statutes of the State of Michigan authorizing the organization of
70 *of* such corporations and prescribing their duties and powers, empowered railway corporations generally to regulate the tolls and compensation to be paid for the transportation of passengers and property, but provided that "such compensation for transporting any passenger should not, except on railroads operating less than twenty miles of road, exceed the following prices, viz: For a distance not exceeding five miles, four cents per mile; for all other distances, not exceeding three cents per mile."

Howell's Statutes, section 3323.

Fourth. On June 28, 1889, there was passed by the legislature of the State of Michigan and approved by the governor thereof an act amending said section 3323, Howell's Statutes, so that the portion above quoted should read as follows: "For a distance not exceeding five miles, three cents per mile; for all other distances, for all com-

panies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equalled or exceeded the sum of $3,000 per mile of road operated by said company, two cents per mile, and for all companies the earnings of whose passenger trains, reported as aforesaid, were over $2,000 and less than $3,000 per mile of road operated by said company, two and a half cents per mile; and for all companies whose earnings, reported as aforesaid, were less than $2,000 per mile of road operated by said company, three cents per mile: Provided, that in future whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of $2,000 or $3,000 per mile of road operated by said company, then in such case said companies shall thereafter,
71 upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, a rate of two cents and a half or two cents per mile, as hereinbefore provided: Provided, That roads in the upper peninsula which report, as above provided, passenger earnings exceeding $3,000 per mile shall not charge to exceed three cents per mile, and roads reporting less than $3,000 per mile shall be allowed to charge not to exceed four cents per mile." * * * Being act No. 202 of the laws of Michigan.

And said act of 1889 provided that it should take effect and become operative October 1, 1889.

Fifth. On the fourth day of October, 1889, one Thomas Wellman prosecuted your petitioner, The Chicago & Grand Trunk Railway Company, in the circuit court (of Michigan) for the county of St. Clair in a civil action, alleging that on the second day of October, 1889, he had desired to go upon defendant's railway from Port Huron to Battle Creek, Michigan, the distance being 159¾ miles, and demanded of your petitioner's ticket agent at Port Huron a ticket for said journey, tendering to him therefor the sum of $3.20, in legal-tender silver coin of the United States, which sum was at the rate of two cents per mile; that said company, your petitioner, by reason of the amount of its earnings, was subject to the provision of said act No. 202 of 1889 of Michigan, which limited its tolls and fares to two cents per mile, but that said agent refused to accept said sum or to sell him a ticket, and thus prevented him from making his journey, to his great injury, &c., &c.

The defendant pleaded a general denial.

72 On the trial of the cause in the State circuit court the plaintiff adduced evidence tending to prove his case, and on the trial it was admitted by stipulation, among other things, that at the time of the plaintiff's application for a ticket and his refusal, as alleged by him, the regular fare charged and exacted by your petitioner of all persons and paid by them from Port Huron to Battle Creek was $4.80, that being at the rate of three cents per mile, and the rate had been the same for more than five years immediately preceding.

That the petitioner's capital stock was $6,600,000, which had been fully paid in; that petitioner's bonded debt was $12,000,000, of which one-half bears interest at the rate of six per cent. per annum and the other half at five per cent., both being payable semi-annually. No part of said bonded debt matures earlier than the year 1900.

That said $18,600,000 represents money actually invested in the said railroad and property and is less than the actual value of the same.

That petitioner owed also an unfunded debt of $896,906.40, bearing interest at 5–6¾ per cent. per annum. Part of said debt was for improvements to property and part for bond interest not earned or paid in previous years.

That the total earnings and income of the defendant from all sources for the year 1888 was $3,228,338.17.

Of this amount there was received from passenger traffic the sum of	$1,065,502 94	
And from freight traffic the sum of	2,160,180 23	
From miscellaneous sources	2,655 00	
Total		$3,228,338 17
73 That defendant's operating expenses for the year 1888 were	$2,404,516 54	
The interest paid on its bonds was	661,335 36	
Other necessary expenses, including interest on part of the unfunded debt, rental of cars, tracks, &c.	150,305 61	
		$3,216,157 51
That, in addition to the foregoing expenses, defendant paid during the year 1888 from its earnings, on account of interest on bonds not paid in previous years		12,257 94
		$3,228,415 45

That the foregoing are fixed charges, which can only be diminished in future out of earnings of the road or by an increase of capital.

The petitioner introduced evidence, which was uncontradicted, tending to show that the legislative act in question (that of 1889) would have the effect of depleting its revenue to the amount of the reduction effected, or nearly so.

Judgment was rendered in the cause in favor of the plaintiff and against your petitioner in the sum of $100; the said circuit court overruled your petitioner's defence that the act in question is unconstitutional, and sustained its validity.

Your petitioner removed said judgment and record to the supreme court of the State of Michigan. Said court last named is the highest

court of the said State of Michigan in which a decision in said suit could be had.

That in said supreme court of the State of Michigan your petitioner, by its counsel, claimed and insisted that said legislative act of the State of Michigan, to wit, act No. 202 of the acts of
74 1889 aforesaid, was invalid because repugnant to the Constitution of the United States for the following reasons, expressly assigned:

First. That said statute is repugnant to section 10 of article I of the Constitution of the United States, which prohibits the passage of any law impairing the obligation of contracts, and is therefore void.

Second. For the reason that said statute is repugnant to article XIV of the amendments to the Constitution of the United States, which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And in said supreme court of the State of Michigan the validity of said statute of the State of Michigan was so drawn in question as being repugnant to the Constitution of the United States, and the decision of said court was in favor of its validity, holding that it was not repugnant to the constitutional provisions aforesaid or to either of them.

The statutes of Michigan require that the decisions of said supreme court, with the reasons therefor, shall be in writing, signed by the judges concurring therein, and that they shall be filed in the office of the clerk of said court.

The said supreme court of the State of Michigan in deciding the said suit against your petitioner delivered its opinion in writing, signed by all the judges thereof.

A copy of said opinion, duly certified under seal of said court, is hereto attached, marked Exhibit A. Your petitioner avers that the Federal question above referred to was expressly raised
75 in said cause in the said State supreme court and was passed on by said court, and a decision of said question was necessary to the decision of said cause; and your petitioner prays that said copy of opinion, Exhibit A, may be inspected, to show that said Federal question was decided, and was necessarily decided.

Your petitioner is aggrieved by the said decision and judgment and therefore prays for allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Michigan in said cause of Thomas Wellman *vs.* The Chicago & Grand Trunk Railway Company, and for the signing the citation and fixing the security to be given according to law.

THE CHICAGO & GRAND TRUNK
RAILWAY COMPANY,
By E. W. MEDDAUGH,
Its Attorney and General Counsel.

E. W. MEDDAUGH,
Attorney for Petitioner.

STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
Wayne County, }

E. W. Meddaugh, being duly sworn, deposes and says that he is attorney and general counsel of The Chicago & Grand Trunk Railway Company, the petitioner above named; that he has read the foregoing petition, which he has subscribed in behalf of said petitioner, and knows the contents thereof, & that the same is true in substance and in fact.

E. W. MEDDAUGH.

Subscribed and sworn to before me this 15th day of January, A. D. 1891.

[Seal Notary Public, Wayne County, State of Michigan.]

FRANCIS E. RANKIN,
Notary Public, Wayne County, Mich.

Writ of error allowed.
Jan. 19, 1890.

HENRY B. BROWN,
Associate Justice Sup. C't.

76 EXHIBIT A.

Supreme Court of Michigan.

THOMAS WELLMAN
v.
THE CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Filed Dec. 24, 1890.

MORSE, *J.*:

By act No. 202 of the Public Acts of 1889 section 3323 of Howell's Statutes, being a part of the general railroad law of this State, was amended.

This amendment, for the purposes of this case, is given here in so far as it affects it.

It is enacted that every railroad corporation shall possess the general powers and be subject to the liabilities and restrictions following—that is to say:

"Ninth. To regulate the time and manner in which passengers and property shall be transported and the tolls and compensation to be paid therefor, but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, shall not exceed the following prices, viz: For a distance not exceeding five miles, three cents per mile; for all other distances for all companies the gross earnings of whose passenger tains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight equalled or exceeded the sum of $3,000 per mile of road operated by said company, two cents per mile, and for all companies the earnings of

whose passenger trains, reported as aforesaid, were over $2,000 and less than $3,000 per mile of road operated by said
77 company, two and a half cents per mile, and for all companies whose earnings, reported as aforesaid, were less than $2,000 per mile of road operated by said company, three cents per mile: Provided that in future whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of $2,000 or $3,000 per mile of road operated by said company, then in such case said companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight 150 pounds, a rate of two cents and a half or two cents per mile, as hereinbefore provided: Provided that roads in the upper peninsula which report, as above provided, passenger earnings exceeding $3,000 per mile shall not charge to exceed three cents per mile, and roads reporting less than $3,000 per mile shall be allowed to charge not to exceed four cents per mile." * * *

P. A. of 1889, pp. 282, 283.

The gross earnings of the defendant corporation, as shown by the report of said corporation to the railroad commissioner for 1888, exceeded the sum of $3,000 per mile.

The law took effect the 2nd day of October, 1889.

On that day the plaintiff applied at the office or station of the defendant at Port Huron for a ticket of passage from Port Huron to Battle Creek, a distance of 159¾ miles, and tendered therefor the sum of $3.20 in legal-tender money of the United States.

The money was refused and the agent of the defendant company refused a ticket to plaintiff for such sum; which refusal, the
78 plaintiff avers, was of damage to him, and brings suit.

The suit was commenced in the circuit court for the county of St. Clair, and the plaintiff recovered judgment.

The circuit judge charged the jury as follows:

"I charge you, gentlemen, that by act No. 202 of the Public Acts of this State of 1889 all railroad corporations owning or operating railroads in this State the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year 1888, equalled or exceeded the sum of three thousand dollars for each mile of road operated by said company were required to transport passengers at the rate of two cents per mile."

"It is admitted that the defendant's earnings per mile, as reported to the commissioner, exceeded that sum."

"It is claimed by the defendant that this law is unconstitutional and void, but I charge you the law is valid, and that under that law the defendant was bound to transport the plaintiff at the rate of two cents per mile, and for its refusal so to do the plaintiff may recover, and it is for you to assess his damages at such sum as you think him entitled to under all the circumstances and such as will compensate him for the injury he is shown to have sustained."

It being evident from the record that this was a friendly suit between the defendant and plaintiff to test the constitutionality of this legislation, the attorney general, when it was brought into this court upon writ of error, very properly interposed and secured counsel to represent the public interest.

In the stipulation of facts or in the taking of testimony in the court below neither the attorney general nor any other person
79 interested for or employed in behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, under our views of the case, is not of material inquiry.

We are not informed what questions were raised in the court below, except that the constitutionality of the statute was attacked.

In this court it is urged that the legislature has no power to prescribe absolutely a maximum rate for passenger fares. That a railroad corporation is a common carrier and the legislature has no right to fix arbitrarily the limit of its charges.

It is admitted that the franchise and privilege conferred by the State upon these corporations to build, own, maintain, and operate a railroad and the power also conferred to exercise the right of eminent domain in securing the right of way for the road and the right of locating the road-bed and tracks along and across public highways and other thoroughfares clothes such railroad property with a semi-public character and subjects it to the control of the State in regard to the compensation for its use to the extent that its charges must be reasonable, and that the legislature has the right as to such property to pass such reasonable rules and regulations as will accomplish that result.

But it is insisted that in its ownership it is private property, and the granting of these privileges does not take from the company its right, as owner, to make and fix its own tarriff of charges, but only requires for the protection of the public that such tariff shall be reasonable. Within the bounds of reasonableness, the owner has full power and right to make such tariff.

Leaving out of view for the present the decisions of the Supreme Court of the United States upon this question, which will be considered hereafter (as this must be conceded to be in some of
80 its phases a Federal question and controlled by such decisions, if applicable), we will examine our own constitution, policy, and laws as regards this subject.

This is the first time, we think, that the right of the State to control and fix the maximum rates of freight or passenger fares has been denied in Michigan.

The statute amended by the act under consideration provided that "the compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight 100 pounds, shall not, except on railroads operating less than 20 miles of road, exceed the following prices, viz: For a distance not exceeding five miles, four cents per mile; for all other distances, not exceeding three cents per mile, and no fare shall be less than five cents, and that amount in any case may be charged and collected: * * *

Provided, that in the upper peninsula five cents per mile may be charged and collected on all railroads * * *" Howell's Stat., subdiv. 9, sec. 3323, page 841.

The first general railroad law of the State provided that "the compensation for any passenger and his ordinary baggage shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided." Session Laws of 1855, sub. 9, sec. 17, page 160; C. L. 1857, vol. 1, p. 638.

In 1869 the legislature amended this subdivision so that the compensation on roads over 25 miles in length should not exceed three cents per mile; not over 25 miles in length, four cents. S. L. 1869, p. 179; C. L. 1871, 1 vol., p. 752.

81 In 1873, after the adoption of the constitutional amendment act. 19 A, there was a general revision of the railroad laws. In that revision the rate was fixed as found in Howell's Statutes. See S. L. of 1873, p. 506.

Section 11 of article 5 of this revision provided that this act might at any time be altered, amended, or repealed, but such alteration, amendment, or repeal should not affect the rights of property of companies organized under it.

Laws of 1873, page 542.
Howell's Statutes, sec. 3395.

It will thus be seen that the right of the legislature to fix the maximum rate for passenger fares has been exercised since the first general enactment as to railroads, in 1855.

The defendant corporation holds its franchise and enjoys its privilege to do business in this State under this general railroad law, and for many years has acquiesced in the statute fixing the maximum rate of its passenger fares, nor has it or any other road in the lower peninsula complained of the distinction made in such law between such roads and the roads in the upper peninsula.

And in 1870 the people of the State amended the organic law, the constitution of the State expressly conferring upon the legislature the power to fix such maximum rates.

"The legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersect-

82 ing lines of railroad."

Art. 19 A, sec. 1.

This constitutional provision beyond all doubt authorizes the legislature to fix maximum rates with only one limitation, to wit, that such maximum rate shall be a reasonable one; and, in my opinion, the use of the word "different" authorizes the legislature not only in such legislation to classify the railroads, but to legislate differently for different railroads.

The argument, therefore, presented by the Hon. Wm. L. Webber

that the legislation under consideration is class legislation and therefore unconstitutional has no weight as against this express clause of the constitution as I construe it.

It must have been the intention of the legislature in submitting this article, as well as of the people in adopting it, to authorize any reasonable classification of railroads in this State for the purpose of fixing such rates. Not only is this the natural and logical interpretation of the meaning of the word "different" as used in said sec. one of the article, but, as shown by Mr. Webber in his argument, there can be no possible legislation on this subject which will not, if general and treating all railroads the same, operate unequally, and therefore be open to the charge that it benefits one class of railroads at the expense of other classes, and consequently will in effect be class legislation.

His argument is, by way of illustration, that if the Michigan Central trains should be limited to the charge of two cents per mile from Jackson to Mackinaw and from Saginaw to Detroit it would of necessity compel the Grand Rapids and Indiana railroad to also carry at two cents a mile from Mackinaw south and the
83 Flint & Pere Marquette railway to carry at the same rate from Saginaw to Detroit, because of the competition between the roads running in the same direction and to the same places, and says: "This is class legislation of the worst character." Or, he says: "Take a more striking illustration. Why should the Michigan Central Railway Co. be limited to two cents a mile" (its gross earnings being over $3,000 to the mile), "the D., G. H. & M. R'y be limited to 2½ cents per mile, and the D., L. & Northern be permitted to charge 3 cents per mile between Grand Rapids and Detroit?"

It is made apparent by his own argument that the general law existing before the amendment of 1889, fixing the maximum rate on all roads in the lower peninsula without classifying them, was also subject to the objection that he makes against the present law as class legislation because it operates unequally. For if fixing the rate at two cents on one class of roads would force, as claimed by Mr. Webber, competing roads whose gross earnings did not reach $3,000 per mile of necessity to also reduce their rates to two cents, thus operating unequally and being legislation benefiting one class more than another, and therefore, as he deduces, class legislation, then a three-cent rate applied to all the railroads is open to the same objection. For if it is unfair and unequal to force all the railroads to a two-cent rate because some can better afford to so limit their charges than others, then it is unfair and unequal, for the same reason, to force a general limit of three or any other number of cents per mile; and this inequality and injustice exists just the same under a general law as it does when forced by the necessities of competition.

In fact, Mr. Webber's whole argument makes it clear that no general law can be passed fixing the maximum rates on all roads alike without reference to cost of construction or service, the
84 amount of their business or income, and their indebtedness

which will not give some roads undue advantage over others. See also R'y Co. *v.* Iowa, 94 U. S., at p. 164.

Therefore, it seems to me, the legislature in submitting and the people in adopting this amendment, knowing that all general legislation in this regard must in its consequences operate in a certain sense as class legislation, wisely use the word "different" to signify, as it naturally does, that the legislature in this matter was granted power to make distinctions in legislation between the different railroads of this State, if such distinctions are reasonably made.

And the distinction between the roads of the upper and lower peninsula must be considered, in the absence of any showing to the contrary, to be a reasonable one.

We are authorized to take judicial knowledge, for it is a matter of general knowledge, that the cost of building and running railroads in the upper peninsula is much greater than that in the lower, owing to the marked physical difference between them in the character and face of the country.

This distinction has been carried in the railroad law of the State for over seventeen years; and distinctions in the legislation upon many matters between the two peninsulas have been constant and frequent ever since the upper peninsula has been a part of Michigan.

And the constitution of 1850 provides differently for the two sections of the State in regard to what the legislature may do as to pay of its members from the upper peninsula. Art. 4, sec. 15.

It provides also for a different disposition of the specific taxes from mining companies in the upper peninsula from other
85 specific State taxes. Art. 14, sec. 1; art. 19, sec. 7.

This portion of the State is also treated by itself in art. 19 and provisions there made as to its courts and other matters.

It is true that art. 15, sec. 1, of the constitution of 1850 prohibits the formation of any corporation in this State, except for municipal purposes, by any other than general laws.

And this provision of the constitution was no doubt rightfully interpreted by this court in Nelson *v.* McArthur, 38 Mich., 207, where it is said that "the great purpose of this provision was to introduce a system of legislation in regard to the institution of corporations which would exclude the corruption and party favoritism which had too often accompanied the method previously in vogue, and to secure, as far as practicable, for all the people of the State an equality of opportunity and a guard against sectional discriminations."

But the amendment known as sec. 1 of art. 19 A was adopted in 1870 and must be considered as qualifying and modifying the letter as well as the spirit of art. 15, sec. 1, as regards legislation fixing the maximum of freight and passenger rates.

It therefore follows, in my view of sec. 1, art. 19 A, of the constition, that the legislature had not only the power to make the distinction it did as to the two peninsulas of our State, but to classify the "different" railroads upon the basis of their gross earnings.

But, in regard to the latter classification, we are not without light

from our own and other courts. In the first place, all roads earning the same amount per mile are treated alike, and there is therefore no distinction between them if the gross earnings of the
86 railroad furnishes a proper and reasonable basis for legislation of this character. Mr. Meddaugh, of counsel for defendant, in his brief makes no complaint against the right of the legislature to make this classification, if they have the right to legislate at all upon the subject, and, in arguing against the constitutionality of the distinction between roads in the upper and lower peninsula, says in his brief:

"There is no excuse for confusing in the mind the power of the State to classify all railroads for passenger and freight rate purposes with reference to their earnings with that of making a territorial division of the roads for the same purpose, for the two are essentially dissimilar in character. By the former all roads similarly circumstanced in respect of earnings are treated alike, while by the latter they may be, as here, treated very unlike. It is this distinction that lies at the very foundation and constitutes the reason of the constitutional provision and the constitutional principle I am urging against this act."

Mr. Kirchner, also of counsel for defendant, argues that the act is not reasonable, because based upon the gross earnings regardless of its operating expenses, when the operating expenses, although they did not do so in 1888, may in the future years exceed the gross receipts.

Mr. Webber, not of counsel, but who, on his request, was permitted to file a brief in the case, objects to the classification of roads in reference of their gross earnings on the ground that there are no reasonable maximum rates contemplated in this classification. It does not purport to be based upon the theory that railroad companies have earned more than reasonable compensation. Such a classification is purely arbitrary. He claims, "It has no relation to the cost of service. It is immaterial whether the road
87 cost $20,000 per mile or $40,000 per mile. It is immaterial whether the terminal facilities have cost millions of dollars to the railroad companies or hundreds only. These questions are all ignored; and, without reference to whether the income of the past has been such as to enable the company to pay its interest or whether the balance is on the wrong side of the ledger, it fixes the limitation purely with reference to the gross income from passenger trains, without reference to cost of service."

It seems to me that a classification according to gross earnings is the fairest and most reasonable method of classification.

Why should a corporation which is more economical than another in the matter of expenses be at a disadvantage in the law over one that is extravagant? And why should a corporation out of debt be entitled to charge less for its services than one heavily in debt?

As was well said on the argument, it would be a strange ordinance of a city that would regulate the amount of fare to be charged by a

hackman by the cost of his team and carriage, and take into consideration the debts he owed and the interest that he was paying.

And yet, if railroads are to be regulated or controlled in the matter of fares by the legislature, upon what principle must they be classified in accordance with their net earnings and their indebtedness taken into consideration which does not govern also the imposition of rates upon hackmen? One is a common carrier as well as the other. Both may be said to have privileges granted them by the government which authorizes a reasonable regulation of their charges, but the privileges of a hackman sink into insignificance when compared with the franchise and privileges granted to
88 railroad corporations; and yet no one has ever contended that a hackman could interpose the cost of his team and carriage or his indebtedness upon them against the reasonableness of the restriction of his charges.

A classification according to the amount of business done per mile seems to me to be the fairest and the most reasonable classification, if railroads are to be classed at all, in the fixing of the maximum rates, and this method of classification is not unusual and has been sustained in a variety of cases.

A law classifying railroads for taxing purposes according to their income was held constitutional in Railroad *v.* Gibbs, 4 S. E. R., 49 (S. C.)

A law classifying business for taxing purposes is constitutional. Singer Man. Co. *v.* Wright, 33 Fed. R., 121.

A law classifying insurance companies for taxation according to the premiums received was held valid in State *v.* Liverpool & London & Globe Insurance Co., 4 South R. (La.), 504.

In Wolcott *v.* People, 17 Mich., 68, it was held that the legislature had the power to tax the business of an individual engaged in carrying express according to the gross earnings of the business.

Mr. Justice Campbell dissented on the ground that sections 11 and 12 of the article of the constitution on finance and taxation declare that "the legislature shall provide a uniform rule of taxation, except on property paying specific taxes," and that "all assessments hereafter authorized shall be on property at its cash value," and that the constitution, pointing out the cases in which specific
89 taxes might be levied, which did not include the case in hand, such taxation was therefore forbidden by the constitution in the case then at bar. There is, however, no intimation in such dissenting opinion that such a listing for taxation was unjust or unreasonable.

In Youngblood *v.* Sexton, 32 Mich., 414, involving the constitutionality of the liquor law of 1875, the validity of the tax was assailed on the ground that it was not levied on any principle of equality or uniformity, and therefore was wanting in one of the essential elements of taxation under our constitution. Mr. Justice Cooley in disposing of this point said: "If the precise point here is that the tax is unequal and unjust because it is not levied in proportion to the business done, then the objection is without force.

It may possibly be true that an apportionment according to the business done would have been more just, but a question of this nature concerns the legislature and not us. Courts cannot annul tax laws because of their operating unequally or unjustly. If they could, they might defeat all taxation whatsoever, for there never yet was a tax law that was not more or less unequal and unjust in its practical workings."

The same may be said here. There can be no classification of railroads for the purposes of fixing maximum rates or carriage but what will operate more or less unequally upon different railroads and be unjust to some of them so classified. To argue that the legislature cannot make any classification which operates uequally is to argue that the legislature can make no classification at all; and if no classification can be made, and the maximum rate must be fixed the same for all, then the law is admitted to operate unequally and unjustly because some companies are to less ex-
90 pense than others in the same length of road by reason of the nature of the country through which they run. Some owe large amounts and some do not. Some have costly terminal facilities and some have not; and some do a large amount of business and some do not.

The matter then resolves itself to this, which is in fact the main argument, to which all the collateral lines of discussion by the defendant's counsel run and connect, that the legislature has absolutely no power to interfere with or regulate the fixing of tolls by the railroad companies of this State.

This view of the case, however, cannot be considered in the light of our constitution, as heretofore shown.

The legislature of Iowa in 1874 enacted as follows: "All railroads in this State shall be classified according to the gross amount of their respective annual earnings within this State per mile for the preceding year as follows: Class A shall include all whose gross annual earnings per mile shall be $4,000 or more; class B, those whose gross annual earnings per mile shall be more than $3,000 and less than $4,000, and class C those whose earnings shall be less than $3,000 per mile."

The statute also provided that railroads in class A should charge not to exceed three cents per mile; class B, not to exceed 3½ cents per mile, and class C, not to exceed 4 cents per mile.

The constitution of Iowa provides, what ours does not, that "all laws of a general nature shall have a uniform operation."

The case went to the Supreme Court of the United States and is found in 94 U. S., 155 (Chicago, Burlington & Quincy R'y Co. *v.* Iowa).

91 It was held, in spite of this constitutional provision, and also of another, to wit, "the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens," that this legislation was valid.

The court said, "The statute divides the railroads of the State into classes, according to business, and establishes a maximum of

rates for each of the classes. It operates uniformly on each class, and this is all the constitution requires."

This latter clause of the Iowa constitution is not found in ours, neither did the constitution of that State directly authorize the passage of laws fixing maximum rates as does ours in article 19 A.

The statutes of Arkansas fixed the passenger rates on lines of railroad 15 miles or less in length, 8 cents per mile; — fifteen and less than 75 in length, 5 cents, and on lines over 75 miles in length, 3 cents. In Dow *v.* Bidleman, 125 U. S., 160, the Supreme Court of the United States upheld this legislation and said:

"The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried or of gross or net earnings during a previous year or according to the simpler and more constant test of the length of the line of the railroad is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

The Iowa case was cited and approved.

It was shown in Dow *v.* Beidleman that the cost of con-
92 struction of the railroad was $4,000,000, and that the company's indebtedness, bonded, was $2,850,000. The net income for 1886 was $162,000, earned principally from passenger traffic at 5 cents per mile. The law under consideration would reduce such net income to $58,000. But it is contended that the reasonableness of such a classification was not raised before or determined by the Supreme Court of the United States in any of these cases, but simply the power of the legislature under the different State constitutions to do so. But if this is so, we are then left to interpret our own constitution and the Federal Constitution without the light of the court upon the subject. As has been already said, I think the classification adopted a fair and reasonable one, nor does it appear to me to conflict, if reasonable, with the provision of the State and National Constitution that no person "shall be deprived of property without due process of law."

But in Dow *v.* Beidleman, *supra*, it was claimed that the legislation there under consideration would reduce the net income so that the company would be able to pay less than one and one-half per cent. on the cost of its road without paying any interest on the bonded debt. If it was applied on the interest of such debt which was bearing interest at 8 %, it could only pay a little over two per cent. upon such debt.

This seems to have raised the question of reasonableness.

But the court said, and the opinion was not dissented from by any member of the court, "The plaintiffs do not contend that it is always or generally unreasonable to restrict the rate of carrying each passenger to three cents per mile. They argue that it is so from the admitted fact that with the same traffic that their road has

now and charging for transportation at the rate of three cents
93 per mile the net yearly income would pay less than one and a half per cent. on the original cost of the road and only a little more than two per cent. on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road or the amount of outstanding bonded indebtedness."

"Without any proof of the sum invested by the reorganized corporation or its trustees the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable, still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law."

Dow *v.* Beidleman, 125 U. S., 690, 691.

The conclusion then is that the legislature has the power, under the constitutional provision contained in article 19 A, and also independently of it, as shown by the cases cited, to classify the railroads of this State as it has according to the amount of business done and also as to their location in the upper or lower peninsula.

Another contention is that this legislation is invalid because it violates the contract which was entered into between the State and this railroad corporation when it organized under the general laws of this State. Mr. Meddaugh, in his brief, says:

"Railroad corporations organized under general laws of Michi-
gan take their being under an implied contract that the State
94 shall not reduce their tariff of passenger and freight rates either in the exercise of its common-law powers or the constitutionally reserved power to repeal, alter, or amend so as to deprive these corporations of the ability to earn a reasonable profit on the capital invested; and the act in question clearly violates this principle."

The defendant corporation, as appears by its own bill of complaint filed in this court in C. & G. T. R'y Co. *v.* Turner, 44 N. W. R., 174, was incorporated under our laws by the consolidation of different railroads. This consolidation and incorporation took place after the adoption of article 19 A, to wit, as shown by its report to the railroad commissioner, April 1, 1880. The companies thus consolidated were five, three of whom had lines within this State, to wit, Michigan Railway Co. of Michigan, running from Mich. and Ind. State line to Lansing, Mich., incorporated January 7, 1880; Chicago & Northeastern R'y Co., running from Lansing to Flint, incorporated Aug. 12, 1874; Northwestern Grand Trunk of Michigan R'y Co., running from Flint to Port Huron, incorporated August 26, 1879.

Each one of these, it will be seen, was also incorporated after the

constitutional enactment and also subsequent to the general revision of 1873.

It is claimed by Mr. Webber in his brief that the proper construction of the phraseology of the statute under consideration does not "subdivide the railroads of Michigan in accordance with the original charters under which the roads were constructed; it applies to railroad companies operating passenger trains; it does not apply to railroad companies not operating passenger trains. To illustrate:

The Grand River division of the Michigan Central railroad
95 was built under a special charter as the 'Grand River Valley Railroad Company,' yet the Grand River Valley Railroad Company operates no passenger trains and makes no report of passenger earnings. The road is operated by the Michigan Central R. R. Co. and the Michigan Central R. R. Co. reports the passenger earnings for this road, and it is the Michigan Central R. R. Co., as to the mileage of this division, which is the company 'whose passenger trains, reported as aforesaid, earn the money.'

"Every railroad in the State having now any considerable mileage is made by a union of companies—that is, different portions of the road were constructed under separate and different charters—but the ownership of the passenger trains and the practical ownership and control of the railroad is vested in the company which operates it, and this law under consideration, when it says 'all companies the gross earnings of whose passenger trains as reported to the commissioner of railroads,' must have reference to the companies operating the railroads, and it cannot be held to apply separately to each particular corporation, whether general or special, by authority of which the road was originally constructed."

I think this construction is the correct one. Consequently this defendant, The Chicago & Grand Trunk Railway Company, must stand upon its own incorporation in this State. The law is aimed at it and not at the separate corporations which it has absorbed and which no longer exist as far as this statute is concerned. Therefore, when it came under the provisions of our laws and accepted the privilege of doing business in this State, it came in under a constitution expressly authorizing the legislature to alter the rates, with only the limitation that all legislation in such direction should be reasonable. This ends the question as to the violation of any contract, implied or otherwise.

96 The constitution prevails, and as long as such provision remains therein I deny the right of our legislature to expressly or impliedly contract away the right of the people through another legislature to enforce this provision of the constitution by such legislation as to them may seem proper, provided it is reasonable.

This view renders it unnecessary to discuss what might have been the rights of the defendant had it been organized and operating passenger trains in this State before the adoption of this article of the constitution.

The right of the legislature to fix the maximum charges of rates upon railroads, if such rates are reasonable, under the Federal Con-

stitution, has been frequently sustained by the United States Supreme Court.

Munn *v.* Illinois, 94 U. S., 113.
C., B. & Q. R. R. Co. *v.* Iowa, 94 U. S., 155.
Pech *v.* N. W. R. R. Co., 94 U. S., 164.
C., M. & St. P. R. R. Co. *v.* Ackley, 94 U. S., 179.
Ruggles *v.* Illinois, 108 U. S., 526.
Stone *v.* Farmers' Loan & T. Co., 116 U. S., 307.
Dow *v.* Beidleman, 125 U. S., 680.
Georgia R. R. Co. *v.* Smith, 128 U. S., 174.
C., M. & St. P. R. R. Co. *v.* Minn., 10 S. E. R., 462.

I shall not attempt to analyze these decisions separately. This has been well done by the briefs on both sides. It is probably true that there has been some fluctuations in the opinions in the different cases, but the power of the legislature to reasonably regulate and control railroads as to their carrying rates has not been denied in any of them, and has, in my opinion, been lately affirmed in the case of The Chicago, Milwaukee & St. Paul R'y Co. *v.* The State of Minnesota, decided March 24, 1890.

97 The majority opinion in the case of Munn *v.* Illinois, the first of the series, hold that the reasonableness of such legislation is a question for the legislature to decide and not for the courts. At page 133 the chief justice says:

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise. In countries where the common law prevails it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or perhaps, more properly speaking, to fix a maximum, beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charges, as one of the means of regulation, is implied. In fact, the common-law rule which requires the charge to be reasonable is itself a regulation as to price; without it the owner could make his rates at will and compel the public to yield to his terms or forego the use."

"But a mere common-law regulation of trade or business may be changed by a statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights

98 of property which have been created by the common law cannot be taken away without due process; but the law itself,

as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the change of time and circumstances. To limit the rate of charge for services rendered in a public employment or for the use of property in which the public has an interest is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

Justice Field, now on the bench, dissented.

This same doctrine seems to have been affirmed in the Iowa case, 94 U. S., 156, and the Peik case, 94 U. S., 164.

There is nothing in any of the other cases in conflict with the idea that the reasonableness of the legislative enactment was to be determined by the legislature until we reached the case of Stone *v.* Farmers' Loan & Trust Co., reported in 116 U. S., 307.

The State of Mississippi in 1884 passed an act to provide for the regulation of freight and passenger rates, and created a commission to supervise and fix the same, instead of doing it directly.

The commission was authorized to revise the tariffs of the companies, but with a view to "the character and nature of the services performed," and so as to "allow a fair and just return on the value of such railroads."

It will be seen that this act made the value of the road a material factor in determining the rates by the commission.

The commission was empowered to receive complaints, cite companies to answer, listen to evidence and arguments, and deter-
99 mine the rates to be charged.

By the statute the determination of the commission was to be received by all courts as *prima facie* evidence that such determination was right and proper. See 116 U. S., 312.

In the opinion of the court Chief Justice Waite cites Munn *v.* Illinois, 94 U. S., 113, and the Iowa case, 94 U. S., 156, and says that it was decided in those cases "that as to natural persons and corporations, subject to legislative control, the State could, in cases like this, fix a maximum, beyond which any charge would be unreasonable, and that such maximum, when fixed, would be binding on the courts on their adjudications as well as on the parties in their dealings." See 116 U. S., p. 330.

But the court on still further speaking on the subject said: "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the State cannot require railroad corporations to carry persons and property without reward, neither can it do that which in the law amounts to a taking of private property for public use without just compensation or without due process of law."

This is made the text for the decision in the Minnesota case on March 24th, 1890, and it is contended by the counsel for the defendant that this last case, reported in 10 Sup. Court Rep., 462, has virtually overruled all the preceding ones, and practically taken away from the legislature not only the power to determine the rea-

sonableness of the maximum rate it fixes, but the authority to fix any such rate at all.

There is certainly nothing in the decision denying the authority of the legislature to establish maximum rates. We have been presented with the brief of John W. Carey, Esq., of Milwaukee,
100 counsel for the railroad company, filed in the case, in which he takes strong ground denying that the legislature of Minnesota is authorized to fix by positive law the rates and charges for the transportation of persons and property over lines of railway owned by the defendant company, and holds that under the Constitution of the United States it is the right of the company to make, fix, and establish its rates and charges over its railway, subject only to the provision that such rates and charges shall be fair, just, and reasonable.

He admits the right of the legislature to fix rates which may govern railroads organized after such legislation, but denies the right of such body to fix the compensation of existing railroads or other like property, and claims that prior to the legislation in Illinois in 1873 and in Iowa, Wisconsin, and Minnesota in 1874 there was no authority for the exercise of such legislation anywhere, either in American or English jurisprudence or legislation. He attacks the case of Munn *v.* Illinois and all the cases following it as unsound and unjust, and insists that the first-named case is not susta-ned by the authorities cited by Chief Justice Waite to support it.

He further says: "We deny that it is a legislative function to adjudicate and determine what are reasonable rates." The question as to whether a given rate is reasonable and fair when challenged is for the judiciary.

Hence, contending that it is the exclusive right of the railroad companies to fix their rates, limited only by the condition that they shall be fair and just, and, when challenged, it being a question for the courts alone to determine, he deduces that the legislature has no right to fix or establish a maximum rate at all; and the
101 court is distinctly asked to reverse and overrule its previous decision to the contrary.

But it did not do so. It would indeed have been a singular action upon the part of the court of the very last resort in this country to have overruled a long line of decisions upon a matter conceded to be of the highest importance to the whole people by implication, and without alluding to the previous opinions of the court, especially when reversal was expressly demanded in the argument of the case.

But, in my opinion, we are not left in the dark by this latest decision upon this question. Mr. Justice Blatchford, in speaking for the court, in answer to the argument that a contract existed that the company should have the power of regulating its rates of toll by its charter, and that any legislation by the State infringing upon that right impairs the obligation of that contract, and that there was no provision in the charter or in the general statute reserving to the State or Territory the right to alter or amend the charter, and that no subsequent legislation of the Territory or State could deprive

the directors of the company of the power to fix its tolls, subject only to the general provision of law that such rates should be reasonable, says:

"But we are of the opinion that the general language of the 9th section of the charter * * * * cannot be held to constitute an irrepealable contract with that company that it should have the right for all future time to prescribe its rates of toll free from all control by the legislature of the State.

It was held by this court in Pennsylvania R. R. Co. *v.* Miller, 132 U. S., 75, in accordance with a long course of decisions both in the State courts and in this court, that a railroad takes its charter, containing a kindred provision with that in question, subject to the general law of the State, and to such changes as may
102 be made in such general law, and subject to future constitutional provisions and future general legislation in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject-matter involved, and that exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is given expressly or unless it follows by an implication equally clear with express words." * * *

"In Stone *v.* Farmers' Loan and Trust Co. (116 U. S., 307–325) the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at that the right of a State reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant or words equivalent in law, and that a statute which grants to a railroad company the right 'from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation' does not deprive the State of its powers within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated; but after reaching this conclusion the court said (p. 331): "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limitation. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freight the State cannot require a railroad corporation to carry persons or property without reward. Neither can it do that in law which amounts to a taking of private property for public use without just compensation or without due process of law."

103 "There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid."

The case was presented to the courts in this way: The legislature of Minnesota created a railroad and warehouse commission, consisting of three persons, appointed by the governor and confirmed by the senate. The statute in relation to this commission and regulat-

ing common carriers provides that "all charges made by any common carrier * * * for any service rendered or to be rendered in the transportation of persons or property * * * shall be equal and reasonable, and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful."

If the commission find at any time that any of such charges are unequal or unreasonable it is granted power and is authorized and directed to compel any common carrier to charge the same and adopt such charge as the commission "shall declare to be equal and reasonable."

Upon complaint that certain charges of the defendant company for conveying milk were unequal and unreasonable the commission proceeded to investigate, and found that such charges were unequal and unreasonable, and declared that a rate of 2½ cents per gallon in ten-gallon cans was an equal and reasonable rate for such service. The company were charging and receiving three cents per gallon for the transportation.

The commission thereupon directed the defendant company to carry the milk for 2½ cents per gallon. The company refused to comply with this direction.

104 The commission, through the attorney general, then made application to the supreme court of Minnesota for a writ of mandamus to compel the company to obey the direction.

The company returned to the alternative writ, which was issued by the court, certain constitutional objections, and also that the rate of 3 cents per gallon was a reasonable, fair, and just rate, and that the rate fixed by the commission was not a reasonable, fair, or just compensation to the company for the service rendered, and that the establishing of such rate by the commission against the will of the company was, *pro tanto*, a taking of its property without due process of law.

Upon the hearing the court refused to take testimony on the issue as to whether the rate fixed by the commission was reasonable, fair, and just, and issued a peremptory writ.

The Minnesota supreme court held that the intention of the legislature was not that the rates fixed by the commission should be merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges. The court held that there was, therefore, no fact to traverse except the violation of the law in refusing compliance with the recommendations of the commission.

This is a brief but substantial statement of the case.

The Supreme Court of the United States, holding that they must except this construction of the statute by the State court as conclusive, was of the opinion that so construed it was in conflict with the Constitution of the United States, in that it deprived "the company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom

105 of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor as an absolute finality the action of a railroad commission, which, in view

of the powers conceded it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

The court further says: "The question of the reasonableness of a rate of charge for transportation by a railroad company involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

This is the whole substance of the decision. It will be noticed that the court does not, except by implication from the language last above quoted, deny the right of the legislature itself to determine the reasonableness of the rates of which it may fix the maximum.

Munn *v.* Illinois and the other cases are not expressly overruled in this regard.

And the case still holds to the doctrine that the State may fix such maximum rates and at best can only be claimed to decide
106 that when the fixing of such rate is delegated to a commission and the reasonableness of the rate fixed by such commission is attacked, the question of such reasonableness is one to be determined by the courts.

And it is evident that the court held also that it was competent for the legislature to create this commission, and that such commission had power to fix rates, provided such rates were equal and reasonable, as the opinion concludes as follows: "In view of the opinion delivered by that court" (supreme court of Minnesota) "it may be impossible for any further proceedings to be taken other than to dismiss the proceedings for a mandamus, if the court should adhere to its opinion that under the statute it cannot investigate judicially the reasonableness of the rates fixed by the commission; still the question will be open for review."

An order was accordingly made, thus intimating clearly that if upon judicial investigation the rates fixed by the commission should be found equal and reasonable the commission should be sustained in its finding and dir-ction.

Upon an examination of the facts and the opinion in this Minnesota case and the cases heretofore cited, beginning with Munn *v.* Illinois, it is clear to us that the Supreme Court of the United States has not overruled the case of Munn *v.* Illinois and the others following it and cited in this opinion, and that the decision in the Minnesota case rests not on the right of the legislature to declare what is a reasonable maximum rate, but upon its right to authorize

a commission to do so. The substance of this last decision is that whether or not the rates established by such commission are reasonable is a question for the courts and not for the commission to determine, as such commission has no means or power to carry on an investigation, and "cannot, in view of the powers conceded it by the State court, be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

107

There is a vast difference between the action and authority of a commission appointed by the legislature and the action and authority of the legislature itself, the sovereign law-making power of the State.

There are many things that a legislature can do that it cannot delegate to any other body, and it would seem, in the opinion of the Supreme Court of the United States, that this is one of them; and now to the case in hand. The constitution of this State, enacted, as before said, before the organization of this defendant corporation, has given the legislature power to from time to time pass laws establishing reasonable maximum rates of charges for railroad transportation.

Who is to judge of the reasonableness of such legislation of the rates so fixed? Is it to be decided by the courts not only upon each separate act of the legislature, but also in the case of every railroad company and also in the case of every person who brings suit for a violation of the law against such company? If so, the courts will not fail of business, nor will the result of a determination of facts by juries to which the court must apply the law of reasonableness be always harmonious or consistent. For instance, a railroad company at the suit of one person may establish that a certain rate is unreasonable, and at the suit of another person the same rate may be determined to be reasonable. The question will ever be opened and never closed. The result of such investigation may be different at one time than it might at another, as the facts generally and commonly understood to enter into the reasonableness of a given rate are liable to change each year and perhaps each quarter of the year. The result will always be shifting and uncertain, and the determination in one suit will not bind in another unless the parties are the same.

108

We think the intention of the people in this constitutional enactment was to authorize the fixing of reasonable maximum rates exclusively by the legislature. Then the result is certain and definite. The law is known, and there is no necessity for litigation, and there can be no different determination in like cases.

If injustice shall be done by the legislature the remedy lies in the good sense of the people and not in the court. It would not be proper for this court to presume that the people intended by the use of the word "reasonable" in this constitutional provision to authorize the courts to determine that which they have by such constitution solemnly committed to the legislature. It would be to presume that they intended to grant in fact the establishing of these rates to the courts instead of to the legislature, because if it is for

the courts to declare what is reasonable, the courts in effect fix the rates in the end. In this view of the case the circuit court was right in its judgment, and the same is affirmed with costs.

109 Champlin, C. J., and Long, J., concurred.

CAHILL, *J.*:

I concur with my brother Morse in the result reached in this case. The importance of the questions involved will justify me in stating some additional reasons that have occurred to me as supporting the position the court has taken, that the right to establish reasonable maximum rates of charges for the transportation of passengers and freight by railroads is under our constitution vested in the legislature, from whose judgment, as expressed in laws legally enacted, there is no appeal except to the people.

I should entertain this view independent of the constitutional amendment of 1870. Const., art. XIX*a*. Section 1, art. XV, of the constitution, authorizing the formation of corporations under general laws, provides that all such laws may be altered, amended, or repealed. The defendant accepted a charter under a general law passed in pursuance of this constitutional power. Under such law and charter it has availed itself of the extraordinary power of exercising the right of eminent domain and to occupy for its uses the public highways of the State. The acceptance of a charter on such terms as were prescribed by the constitution and laws, and the acquisition of important property rights and franchises by virtue of powers therein granted, amounted to a consent on its part to legislative control. In so far as its property is affected by it, it is by its own act of consent and not by "due

110 process of law." There is, in my opinion, no need under our constitution to base the right of legislative control of railroads upon any presumed dedication of their property to public use, growing out of the interest which the public has in such property and the manner of its use. That presumption has been held sufficient to support such right by the Supreme Court of the United States in the Granger cases. Munn *vs.* Illinois, 4 Otto, 113, 126. In this State a railroad company needs to make no dedication of its property to public use, because it takes its property and franchises in the beginning charged with the incumbrance of legislative control. When it acquires life it by the same act submits to limitations. This creature of the law consents to be born and to assume its functions knowing that its life and fortunes are entrusted to the discretion of its creator.

It is not contended by counsel for defendant that the State has no control over the rates of charges it shall make for the carriage of passengers. It is conceded that it can be required to charge only reasonable rates; but it is contended that the determination of what is reasonable is a judicial and not a legislative function. Under our constitution it is the legislature that has power to create corporations and have them under control. No such power is vested in the judiciary in any sense different from that it has over natural persons; nor is there anything in the power to

be exercised that is essentially judicial. So far as the right has been exercised to regulate the charges of tracks and drays in cities, of wharf-s, turnpikes, bridges, canals, grain elevators, ferries, and mills the rates of interest for the use of money—and it has been exercised in all countries so long that the memory of man runneth not to the contrary—it has been done by legislation, and I know of no case when the matter has been referred
111 to the courts. The legislature has peculiar advantages for arriving at a correct judgment as to what charges are reasonable not possessed by the courts. A correct judgment can only be formed or approximated after a careful *steady* of many facts concerning the cost of building and operating a road, the extent of its business and earnings. The legislature can and has provided the machinery for collecting this information through the commissioner of railroads. Laws of 1873, act 79. The courts have no means of accumulating this information. If anything were needed to demonstrate that the question of the reasonableness of rates of fares was legislative rather than judicial the record in this case would go far toward doing so. The plaintiff claims to have been injured to the extent of one dollar and sixty cents. To redress this grievance he brought this suit, and the defendant's position is that it has the right to show that the fare tendered was unreasonable in amount, reference being had to all the facts that must affect the question. If the contention of the defendant be admitted and the question of reasonableness be tried and determined by the courts, nothing is settled by it except the question of the plaintiff's right to the small sum claimed as damages. No principle is or can be settled in this suit that will necessarily govern in other suits of a similar character, because the facts and circumstances that affect the cases may, and usually must, be somewhat different. In a court of law every case must stand upon its own facts, and neither party to a suit could be concluded by the judgment in a former suit to which they were neither parties nor privies. If, then, the reasonableness of a fare is a judicial question to be settled only in a suit at law by the
112 person aggrieved, the public is practically without remedy, as the costs and expenses of the litigation must inevitably exceed any possible recovery. It may be said with some force that this circumstance ought not to control or have much weight in determining a question of right. But, keeping in view the admitted fact that the power of control must rest somewhere, the practical facilities on the one hand, and difficulties on the other, are considerations that might properly weight with those who were settling in the formation of a constitution a method of governmental control. Nor do I think that the constitutional amendment of 1876, before cited, which expressly provides that "the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State," is more than declaratory of a power that already existed. The argument that the use of the word reasonable in the amendment makes a judicial question out of what was without it a legislative question seems to me to be without force. The

amendment of 1870 was neither a grant nor a limitation of power. It was a declaration of power already reserved in the constitution, and the amendment served only to put beyond question the right of the legislature which was before thought to be open to debate. It would be little short of usurpation, it seems to me, for the courts to assume to determine for the legislature a question which the constitution has solemnly committed to it. The use of the word reasonable may as well be regarded as an admonition to the legislature as to the courts, and it cannot be assumed that the admonitions of the constitution will be more sacredly regarded by one b-anch of the government than another. It seems to be considered by those
113 who argue against legislative control that to concede the power to regulate carries with it the power to destroy. As a question of abstract power this may be true, but it is not truer of legislative than of judicial control. Concede the power, and its abuse is possible. "All power is subject to abuse, and if this circumstance is to be taken as an argument against its existence we are irresistably driven to results fatal to all government. * * * All human agencies are fallible, and the wisdom of man has never been able and never will be able to devise a system of government incapable of abuse. Every department may exceed its authority or pervert its power. The judiciary has no pre-eminent claim to infallibility." Graves, J., in People *vs.* Salem, 20 Mich., 503. In my opinion the fear of spoliation by the legislature is without foundation. That there is a desire on the part of the people to act fairly and to deal justly by the railroads is evidenced by the fact that at a considerable cost they have established a bureau for the collection of the information absolutely necessary to the formation of a just judgment. That the legislature may make mistakes is probable; that it may act unjustly in a given case is possible, but that it will in the end pursue a course calculated to cripple or destroy the railroads, those great arteries of trade on which the commercial life of the people depends, is as unlikely as that a reasonable man will commit suicide.

As evidence that the right to fix the rate of charges for the transportation of passengers and freight by railroads belongs to the legislature and not to the courts, I call attention to the fact that the power has been exercised by the legislature from the earliest
114 history of the State. The Michigan Central charter, granted by special act, in 1846, provided that the rate for passenger fares should not exceed three cents per mile, and for freight the charges were not to be greater than those upon certain New England roads named. Sec. 15, act 42, Laws 1846.

The Michigan Southern charter limited the right of the company to such charges as were authorized by the State to be taken on the first day of January, 1846. Laws of 1846, act 113, § 15.

The first general railroad law, passed in 1855, contained an express limitation upon the charges that should be made by companies organized under it for the transportation of passengers and freight. Laws of 1855, § 17, par. 9, p. 153.

See also revision of railroad laws, Laws of 1871, p. 328, § 10, par. 9.
" " 1873, p. 506, § 9, par. 9.
" " 1877, p. 186, § 9, par. 9.

The rates of charges as fixed by those several acts, when we consider the cost of railroad construction and maintenance, the extent of the business transacted, and the earnings then as compared with the present, was lower than the rates fixed by the act of 1889, and yet not only was the right of the legislature to fix such rates not contested, but the reasonableness of the rates fixed was unquestioned.

No more important question than that involved here has, in my judgment, been before this court. The issue is clearly made up, and we are to determine, perhaps for all time, the power of the State over the railroads built under the sanction of its laws. There are candid and thoughtful men—men who love justice and hate oppression—who fear for the result if this great public interest is
115 given over to legislative control freed from any judicial supervision. I do not join in those fears, but if I did I could not change my views of the power which the constitution has vested in the legislature over this subject.

A legislator who, in the exercise of this great power committed to him by the constitution, suffers himself to be influenced by any motive except a desire to deal justly between the people and those who by putting their fortunes into the railroads have enriched and made prosperous our Commonwealth is an enemy of the State and unworthy of citizenship in it.

GRANT, *J.*:

I concur in the result, under the rule of *stare decisis*, regarding the question as settled by the decisions of the Supreme Court of the United States referred to in the opinion of my brother Morse.

STATE OF MICHIGAN, *ss*:

IN THE SUPREME COURT, CLERK'S OFFICE.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed is a true and correct copy of the opinion of the court now on file in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom and the whole of said original.

Seal of the Supreme Court of Michigan, Lansing.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this tenth day of January, A. D. 1891.

CHAS. C. HOPKINS, *Clerk.*

116 UNITED STATES OF AMERICA, *ss*:

The President of the United States to Thomas Wellman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan,

wherein The Chicago & Grand Trunk Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 29th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

117 [Endorsed:] Orig'l citation. Filed Feb. 5, 1891. Chas. C. Hopkins, clerk supreme court.

Due personal service of a copy of this citation is hereby acknowledged.

Lansing, Feb. 4th, 1891.

A. A. ELLIS,
Attorney General for State of Michigan.

Due personal service of a copy of within citation is hereby accepted.

Port Huron, Feb'y 5th, 1891.

WM. T. MITCHELL,
Attorney for Thomas Wellman, Plaintiff in said Cause.

118 Know all men by these presents that we, the Chicago & Grand Trunk Railway Company, as principal, and John Pridgeon, of the city of Detroit, county of Wayne and State of Michigan, as surety, are held and firmly bound unto Thomas Wellman, of Port Huron, Michigan, in the full and just sum of five hundred dollars, to be paid to the said Thomas Wellman, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a session of the supreme court of the State of Michigan, in a suit pending in said court between said Thomas Wellman, as defendant in error, and the said Chicago & Grand Trunk Railway Company, plaintiff in error, a judgment was rendered against the said Chicago & Grand Trunk Railway Company, and the said Chicago & Grand Trunk Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas Wellman, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Chicago & Grand Trunk Railway Company shall prosecute its said writ to effect and answer all damages and costs if it fail to make

its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CHICAGO & GRAND TRUNK
RAILWAY COMPANY, [SEAL.]
119 By L. J. SEARGEANT, [SEAL.]
Its President.
CHAS. PEVEY, *Secretary.*
JOHN PRIDGEON. [SEAL.]

Sealed and delivered in presence of—
MILES BRONSON.

Approved by—
H. B. BROWN,
Associate Justice of the Supreme Court U. S.

Endorsed: Filed Feb. 4, 1891. Chas. C. Hopkins, clerk supreme court.

120 In the Supreme Court of the United States.

THE CHICAGO & GRAND TRUNK RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS WELLMAN, Defendant in Error.

Pursuant to section 997 of the Revised Statutes of the United States (but reserving the right to assign errors under rule 21 of this court), the plaintiff in error, by E. W. Meddaugh, its attorney, comes and says that in the record and proceedings in this cause there is error, in this, that the supreme court of the State of Michigan, in affirming the judgment of the circuit court for the county of St. Clair (in said State), erred for the following reasons:

1. Because act No. 202 of the Session Laws of Michigan of 1889 (quoted below), by authority of which said suit was brought, is repugnant to section 10 of article I of the Constitution of the United States and void.

2. Because said act is repugnant to article XIV of the amendments to the Constitution of the United States and void.

3. Because said supreme court of the State of Michigan erred in holding said act No. 202 to be valid under the Constitution of the United States.

121 And said plaintiff in error prays that the judgment of said supreme court of the State of Michigan in said cause be reversed.

E. W. MEDDAUGH,
Attorney for Plaintiff in Error.

The material portion of said act No. 202 is as follows: "But such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz: For a distance not exceeding five miles, three cents per mile; for all other distances, for all

companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equalled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile, and for all companies the earnings of whose passenger trains, reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings, reported as aforesaid, were less than two thousand dollars per mile of road operated by said company, three cents per mile; provided that in future, whenever the earnings of any company doing business in this State, as reported to the commissioner
122 of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case said company shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half or two cents per mile, as hereinbefore provided; provided that roads in the upper peninsula which report, as above provided, passenger earnings exceeding three thousand dollars per mile shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile."

Due personal service of a copy of above assignment of errors is hereby accepted.

Port Huron, Feb'y 4, 1891.

WM. T. MITCHELL,
Attorney for said Thomas Wellman, Plaintiff.

Due personal service of a copy of the within assignment of errors is hereby accepted.

February 4th, 1891.

A. A. ELLIS,
Att'y General, State of Mich.

[Endorsed:] Original. Supreme Court of the United States. Chicago & Grand Trunk Railway Co. *vs.* Thomas Wellman. Assignment of errors. Filed Feb. 5, 1891. Chas. C. Hopkins, clerk supreme court.

123 10902.

Parties.	Plaintiff's attorneys.	Defendant's attorneys.
Thomas Wellman, plaintiff, *vs.* The Chicago and Grand Trunk Railway Company, defendant and appellant.	William T. Mitchell John Atkinson B. W. Huston, att'y gen'l.	E. W. Meddaugh. Otto Kirchner.

Error to St. Clair.

Costs.	Journal.	Date.	Proceedings.
		1889.	
2 00		Nov. 30	Præcipe filed and writ issued; ret. Dec. 20, '89.
		Dec. 11	Proof of notice of writ filed.
		" "	Assignment of errors "
		" "	Note of argument filed.
		" 23	Return filed.
		1890.	
	J, 76...	Jan. 24	Submitted on briefs.
	" 235...	May 16	Reargument ordered.
	" 277...	June 13	Argued in part.
	" 286...	" 25	Concluded and submitted.
	" 466...	Dec. 24	Affirmed with costs.
		1891.	
		Feb. 4	Writ of error from Sup. C't U. S. filed.
		" "	Bond to adverse party filed.
		" "	Petition with allowance endorsed thereon filed.
		" "	Copy of writ for adverse party filed.
		" 5	Citation with acceptance of service filed.
		" "	Assignment of errors in Sup. C't U. S. filed.
		" 7	Return sent to clerk Sup. C't, at Washington.

[Endorsed:] No. —. State of Michigan. The —— court for the —— of ——, in chancery. —— ——, complainant, *vs.* —— ——, defendant. Certified copy of calendar entries in supreme court. Filed —— —, 188–. —— ——, clerk. —— ——, attorney for ——.

124 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas Wellman, plaintiff, and The Chicago & Grand Trunk Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Consti-
125 tution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of said defendant, as by its complaint appears, we, being willing that error, if any

hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 29th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

126 [Endorsed:] Orig'l writ of error. Filed Feb'y 4, 1891. Chas. C. Hopkins, clerk supreme court of Michigan.

To the Supreme Court of the United States:

The execution of the within writ appears by the transcript of record hereto annexed.

Dated, Lansing, Mich., Feb. 7, 1891.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

127 Supreme Court of the State of Michigan.

THE CHICAGO & GRAND TRUNK RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS WELLMAN, Defendant in Error.

STATE OF MICHIGAN, *In the Supreme Court,* } *ss:*

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court and filed in my office, as appears of record and on file in my office; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached

thereto are the writ of error, with allowance endorsed thereon; also the petition on which said writ of error was allowed, the citation, with acceptance of service by counsel for the defendant in error, a copy of the bond to the adverse party filed with the writ of error, and the assignment of errors by the plaintiff in error in the Supreme Court of the United States; that at the time the said writ of error was served upon me there was lodged with me for the adverse party a copy of such writ.

128 In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this seventh day of February, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk of the Supreme Court of the State of Michigan.

129 In the Supreme Court of the United States.

THOMAS WELLMAN, Def't in Error,
ads.
THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY, Pl't'ff in Error.

And hereupon, afterwards, to wit, on the 14th day of February, A. D. 1891, the said Thomas Wellman, def't in error, by William T. Mitchell, his attorney, freely comes here into court and says that there is no error either in the record or proceedings aforesaid or in giving the judgement aforesaid by the supreme court of the State of Michigan, and he prays that the said Supreme Court of the United States, before the aforesaid justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgement aforesaid in form aforesaid given may be in all things affirmed, &c.

WM. T. MITCHELL,
Attorney for Def't in Error.

130 [Endorsed:] Supreme Court of the United States. Thomas Wellman, def't in error, *ads.* The Chicago & Grand Trunk Railway Company, pl'ff in error. Joinder in error. Wm. T. Mitchell, att'y for def't in error.

Endorsed on cover: Case No. 14,487. Michigan supreme court. No. 1031. The Chicago & Grand Trunk Railway Company, plaintiff in error, *vs.* Thomas Wellman. Filed February 21, 1891.

1031

JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE CHICAGO & GRAND TRUNK RAILWAY COMPANY,

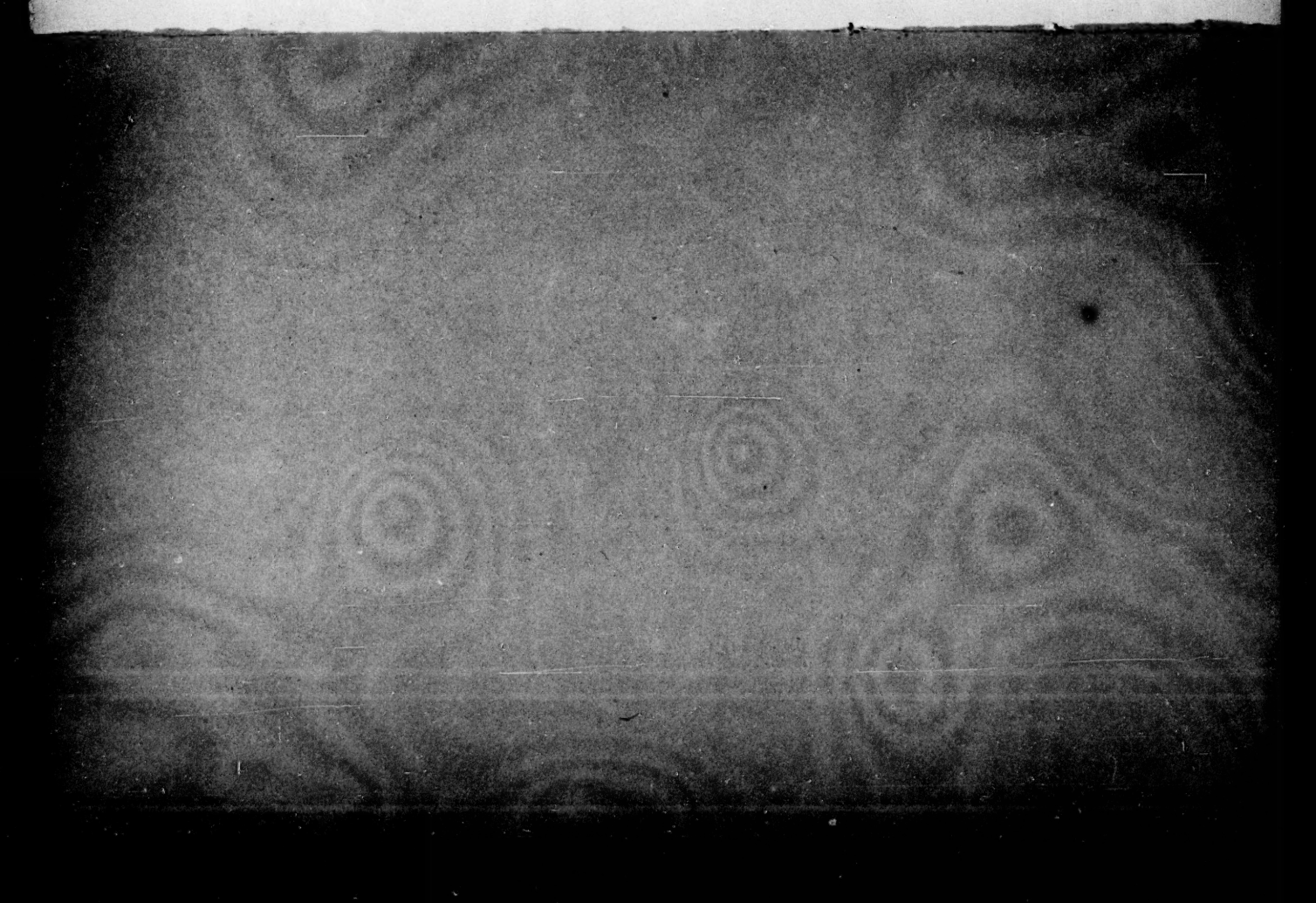
Plaintiff in Error.

vs.

THOMAS WELLMAN,

Defendant in Error.

MOTION TO ADVANCE CAUSE FOR HEARING AT OCTOBER TERM, 1891.



Supreme Court of the United States.

THE CHICAGO & GRAND TRUNK RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS WELLMAN,
Defendant in Error.

Now comes the Chicago & Grand Trunk Railway Company, plaintiff in error in the above entitled cause, by E. W. Meddaugh, its attorney, and moves the court for an order to advance said cause on the docket for hearing at an early date.

This motion is based upon the following state of facts, all of which appear in the record and files of the cause in this court, except such as are hereinafter otherwise expressly stated:

1. The plaintiff in error is a corporation, duly organized, under and pursuant to the laws of the States of Michigan, Indiana and Illinois, April 1, 1880, by consolidation of various corporations theretofore existing, two of which corporations had been organized under the laws of Michigan, which provide generally for the organization of railroad companies, about the year 1869, and earlier.

2. On the 28th day of June, 1889, the plaintiff in error owned and operated a line of railway between the City of Port Huron, Michigan, and the City of Chicago, Illinois, and which passed through the City of Battle Creek, in the

State of Michigan, being in all about 335 miles in length, as it had done since said 1st day of April, 1880.

3. At the time of the creation of plaintiff in error and of the Michigan corporations merged in it—three in all,—the statutes of the State of Michigan authorizing the organization of such corporations and prescribing their duties and powers, empowered railway corporations generally to regulate the tolls and compensation to be paid for the transportation of passengers and property, but provided that "such compensation for transporting any passenger should not, except on railroads operating less than 20 miles of road, exceed the following prices, viz: For a distance not exceeding five miles, four cents per mile; for all other distances, not exceeding three cents per mile."—*Howell's Statutes, Sec. 3323.*

4. On June 28, 1889, there was passed by the legislature of the State of Michigan, and approved by the governor thereof, an act amending said section 3323, Howell's Statutes, so that the portion above quoted should read as follows:

"For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the Commissioner of Railroads for the year one thousand eight hundred and eighty-eight equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile; and for all companies the earnings of whose passenger trains reported as aforesaid were over two thousand dollars and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile; and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: Provided, That in future, whenever the earnings of any company doing business in this State, as reported to the Commissioner of Railroads, at the

close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case, said companies shall thereafter, upon the notification of the Commissioner of Railroads, be required to only receive as compensation for the transportation of any passenger, and his or her ordinary baggage not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half or two cents per mile, as hereinbefore provided: Provided, That roads in the Upper Peninsula which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile,"—being Act No. 202 of the laws of Michigan of the session of 1889.

And said Act of 1889 provided that it should take effect and become operative October 1, 1889.

5. On the fourth day of October, 1889, the defendant in error prosecuted the plaintiff in error, in the circuit court (of Michigan) for the county of St. Clair, in a civil action, alleging that on the 2nd day of October, 1889, he had desired to go upon the railway of the plaintiff in error, from Port Huron to Battle Creek, Michigan, the distance being 159¾ miles, and demanded of the ticket agent of plaintiff in error at Port Huron a ticket for said journey, tendering to him therefor the sum of $3.20, in legal tender silver coin of the United States, which sum was at the rate of two cents per mile; that plaintiff in error, by reason of the amount of its earnings, was subject to the provisions of said act, No. 202 of 1889, of Michigan, which limited its tolls and fares to two cents per mile, but that said agent refused to accept such sum or to sell him a ticket; and thus prevented him from making his journey; to his great injury, &c., &c.

The plaintiff in error pleaded a general denial.

On trial of the cause in the State circuit court, the defendant in error adduced evidence tending to prove his case; and on the trial it was admitted, by stipulation, among other things, that at the time of the application of the defendant in error for a ticket, and his refusal, as alleged by him, the regular fare charged and exacted by plaintiff in error of all persons, and paid by them, from Port Huron to Battle Creek was $4.80, that being at the rate of three cents per mile; and the rate had been the same for more than five years immediately preceding.

That the capital stock of the plaintiff in error was $6,600,000, which had been fully paid in. That the bonded debt of plaintiff in error was $12,000,000, of which one-half bears interest at the rate of six per cent. per annum, and the other half at five per cent., both being payable semi-annually, and that no part of said bonded debt matures earlier than the year 1900.

That said $18,600,000 represents money actually invested in said railroad and property, *and is less than the actual value of the same.*

That plaintiff in error owed also an unfunded debt of $896,906.40, bearing interest at 5 per cent. to 6¾ per cent. per annum. Part of said debt was for improvements to property, and part for bond interest not earned or paid in previous years.

That the total earnings and income of the plaintiff in error, from all sources, for the year 1888, was $3,228,338.17.

Of this amount there was received,—

From passenger traffic the sum of . . .	$1,065,502.94
And from freight traffic the sum of . . .	2,160,180.23
From miscellaneous sources	2,655.00
Total, ...	$3,228,338.17

That the operating expenses of plaintiff in error for the year 1888, were	$2,404,516.54	
The interest paid on its bonds was	661,335.36	
Other necessary expenses, including interest on part of the unfunded debt, rental of cars, tracks, &c., ...	150,305.61	
		$3,216,157.51
That in addition to the foregoing expenses, plaintiff in error paid during the year 1888, from its earnings, on account of interest on bonds not paid in previous years, . . .		12,257.94
		$3,228,415.45

That the foregoing are fixed charges, which can only be diminished in future out of the earnings of the road, or by obtaining further funds by increase of capital, which is entirely impracticable under existing conditions.

The plaintiff in error introduced evidence—which was uncontradicted—tending to show that the legislative act in question (that of 1889) would have the effect of depleting its revenue to the amount of the reduction effected, or nearly so.

Judgment was rendered in the cause in favor of the defendant in error, and against the plaintiff in error, in the sum of $100. The said circuit court overruled the defense, insisted upon by the plaintiff in error, that the act in question is unconstitutional, and sustained its validity.

The plaintiff in error removed said judgment and record to the Supreme Court of the State of Michigan. Said court last named is the highest court of the said State of Michigan, in which a decision in said suit could be had. In said

Supreme Court of the State of Michigan, the plaintiff in error, by its counsel, claimed and insisted that said legislative act of the State of Michigan, to-wit: Act No. 202 of the acts of 1889, aforesaid, was invalid, because repugnant to the constitution of the United States, for the following reasons expressly assigned:

1st. That said statute is repugnant to section 10 of article I., of the constitution of the United States, which prohibits the passage of any law impairing the obligation of contracts, and is, therefore, void.

2d. For the reason that said statute is repugnant to article XIV. of the amendments to the constitution of the United States, which declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

And in said Supreme Court of the State of Michigan, the validity of said statute of the State of Michigan was so drawn in question as being repugnant to the constitution of the United States, and the decision of said court was in favor of its validity, holding that it was not repugnant to the constitutional provisions aforesaid, or to either of them.

Said act was observed by the plaintiff in error, in common with other railway companies of the State, from the early part of October, A. D. 1889, to the 15th day of May, A. D. 1890. The judgment of this Court in the case of the Chicago, Milwaukee & St. Paul Ry. Co. vs. The State of Minnesota was thought by counsel for the plaintiff in error to be conclusive of the invalidity of said act, and on the 15th of May, following said judgment, the plaintiff in error, under advice of its counsel, restored its passenger rates to three

cents per mile, and so continued the rate until after the decision of the Supreme Court of the State of Michigan sustaining the validity of said act; when, to wit, on March 1, 1891, in deference to the judgment of said court, the rates were again reduced to two cents per mile as required by said act, and have ever since so continued.

During the period from October, 1889, to the 15th of May, 1890, while said act was being observed by the plaintiff in error, its loss of revenue from passenger traffic, through the reduction of said rate of fare, was $23,000 and upwards. Its loss of revenue between the 1st of March last and the 1st of August last, from passenger traffic, by reason of the reduction of rates in compliance with the requirements of said act, has been $44,015.76, as shown by the following tables:

Month, 1891.	Number of Passengers.	Michigan Earnings.	Would have been at 3c. per mile.	Loss.
March.....	33,230	$17,688 41	$25,921 90	$8,233 49
April.....	33,018	18,715 58	27,357 37	8,641 79
May.....	30,531	17,918 98	26,320 34	8,401 36
June.....	31,333	20,369 76	29,736 70	9,366 94
July	31,950	20,282 04	29,654 22	9,372 18
Total.....	160,062	$94,974 77	$138,990 53	$44,015 76

The details of returns have not been made at this date, for the later months of August and September, so as to show what the passenger earnings for those months were; but sufficient is known to warrant the statement that the loss of revenue for that period has been equal to the average loss per month for the five preceding months.

The total earnings of the plaintiff in error from all sources for the year 1880 were	$3,835,525 07
Its total operating expenses were	3,053,600 64
Leaving a balance of	$781,924 43

The interest on its debt was	$659,976 93
The remainder appropriable to dividends on stock for the year 1890 was . . .	$121,947 50

which, distributed over $6,600,000 of stock would give $1\frac{7}{10}$ per cent. on the dollar.

But,—owing to indebtedness incurred in previous years for interest on its bond debt which the earnings were not equal to the payment of,—even this small and inadequate dividend could not be paid, as the money had to be applied to the payment of this back interest.

Its total earnings from all sources, for the year 1891, from January 1 to August 1, were	$2,159,536 08
Its operating expenses for the same period were	1,745,993 17
Balance	$413,542 91
The accrued interest on its debt for the period was	385,000 00
This leaves a surplus that might be appropriated to dividend on stock, of . . .	$28,542 91

Assuming the earnings and operating expenses to continue at this rate to the end of the year, which accords with past experience, the aggregate surplus for the year will be $48,930.70. This might be devoted to dividends, if not imperatively required to pay debts, as was the case in the surplus of 1890. If appropriated to dividends, it would pay the paltry sum of seven tenths of one per cent. on the dollar of the stock. But it cannot be so used—creditors take precedence of stockholders.

There has, at no time since the organization of the plaintiff in error, been any appropriation of its earnings or revenue to improvements or betterments. The figures here given as operating expenses represent only expenditures actually made

in carrying on the business of the road and making good the ordinary wear caused by its use. Very strict economy has been uniformly observed in all things and in the general management, more strict, in fact, than is consistent with the permanent well-being of the road.

The bond debt of the company remains the same as stated in the record of this cause, and the earnings have not been sufficient since to enable the company to pay off any part of its floating debt as therein given.

The statements of facts, as they appear in the record, are admitted as true; they were so stipulated, and therefore should be considered and treated here in all respects as if they had been specifically found by special verdict of the jury. Thus the bond and other debt of the plaintiff in error, the amount of its capital stock and that it is fully paid, and that the actual value of its railroad and property is equal to the sum of its indebtedness and capital stock, are admitted facts. There is, I respectfully submit, no opening for indulging the hypothesis of wastefulness or extravagance in construction.

It thus appears that the earnings of the company over its operating expenses have not thus far been large enough to enable it to pay anything to its stockholders! That the road and its business are conducted economically—and not extravagantly—must certainly be presumed, in the absence of anything showing the contrary; and such is unquestionably the fact.

The authorized passenger rate of three cents per mile was the law of the State when the corporation was organized, as it had been from the first enactment of the general railroad law of the State, in 1855. The railroad was constructed, and capital for the purpose contributed, in the faith that this rate would continue at least until such time as the earnings of the company, in excess of the necessary operating expenses and fixed interest charges, should be equal to the

payment of something more than a reasonable dividend on the capital stock. The reasonableness of the rate of three cents per mile was determined by the statutory law in the conditions existing in 1855, and continuing down to the date of the act in question. The state of facts disclosed in the printed record shows this rate is still reasonable, and the reduced rate grossly unreasonable. This act of the legislature of Michigan is simply confiscation. Under its provision any dividend on the capital stock of $6,600,000 is impossible. It is no answer to this to say that at some future time the earnings may or even probably will so increase as to pay dividends.

But I must assume that the merits of the question involved in this case will not be considered by the court on this motion. The simple question now is whether the case is of such a nature as to call for an early hearing and decision of it. This, I submit, sufficiently appears from the foregoing. The plaintiff in error is losing, under the operation of this unjust act, something over $100,000 of revenue per annum. The case will not be reached for hearing, in its regular course on the docket, for the next three years. In the mean time this annual loss of revenue to the company will continue. Should this court finally declare the act invalid, the company will have no redress against the State of Michigan for recovery of damages. Its loss will be irreparable.

Most of the other railway companies of the State of Michigan are affected by said act similarly with the plaintiff in error, although in different degrees. They are, therefore, indirectly interested in the question involved in this case. This is, in fact, a test case.

If this motion should be refused, the plaintiff in error may be forced by the financial necessity of the situation—as may all the other railway companies affected—to restore its rate of passenger fare to the three cents per mile authorized by the former law. This action would place the railway

companies of the State in unseemly antagonism with the State government, which the railway companies are all desirous of avoiding. The State authorities appreciate the situation, and have signified their desire to have the case heard as soon as practicable, for this reason.

Attorney for Plaintiff in Error.

[Copy.]

SUPREME COURT OF THE UNITED STATES.

THE CHICAGO & GRAND TRUNK RAILWAY COMPANY,
Plaintiff in Error,
vs.
THOMAS WELLMAN,
Defendant in Error.

In behalf of the State of Michigan, which is vitally interested in the question involved in this cause, it is my desire and intention, by leave of the court, to appear and participate in the argument thereof. It is the interest of the State and its people that the question be determined by the judgment of this court at as early a day as practicable. I, therefore, representing the State as its Attorney General, and by advice and consent of its Chief Executive, hereby unite with the plaintiff in error in asking that the cause be advanced on the docket of this court for hearing at the earliest practicable date; and that in the order advancing said cause, permission may be granted to the Attorney General of the State of Michigan to appear and participate in the argument of said cause.

A. A. ELLIS,
Attorney General,
State of Michigan.

SUPREME COURT OF THE UNITED STATES.

THE CHICAGO & GRAND TRUNK RAILWAY COMPANY,
Plaintiff in Error.
vs.
THOMAS WELLMAN,
Defendant in Error.

The plaintiff in error in the above entitled cause having entered a motion to advance said cause for hearing at the October, 1891, Term of said court, I hereby join in said motion, and consent to the advancement of said cause.

WM. T. MITCHELL,
Attorney for Defendant in Error.

Port Huron, Mich., Oct. 2, 1891.

Office Supreme Court U. S.
FILED,
JAN 4 1892
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

THE CHICAGO & GRAND TRUNK RAILWAY COMPANY,
Plaintiff in Error,
vs.
THOMAS WELLMAN.

Term No. 1031.

BRIEF FOR PLAINTIFF IN ERROR.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

E. W. MEDDAUGH,
Attorney for Plaintiff in Error.

GEO. F. EDMUNDS,
Of Counsel.

DETROIT:
John F. Eby & Co., Printers,
1891.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE CHICAGO & GRAND TRUNK RAILWAY COMPANY, *Plaintiff in Error,* vs. THOMAS WELLMAN.	*Term No. 1031.*

BRIEF FOR PLAINTIFF IN ERROR

1. The plaintiff in error is a corporation, duly organized under and pursuant to the laws of the States of Michigan, Indiana and Illinois, April 6, 1880, by consolidation of various corporations theretofore existing, three of which corporations were organized about the year 1869, and earlier, under the laws of Michigan which provide generally for the organization of railroad companies.

Act 198, Sess. Laws Mich., 1873, p. 496–521; Act 140, Sess. Laws Mich., 1879, p. 141.

See Secs. 3313, et seq., and 3343 Howell's Annotated Statutes of Michigan, 1882.

Chap. 205 and 210 Revised Statutes of Indiana of 1876.

Chap. 32, Revised Statutes of Illinois (Hurd), 1877, p. 290, et seq. (Secs. 50–58.)

Chap. 67, Comp. Laws Mich., 1857 (p. 631).

2. On the 28th day of June, 1889, the plaintiff in error owned and operated a line of railway between the city of Port Huron, Michigan, and the city of Chicago, Illinois, and which passed through the city of Battle Creek in the State of Michigan, being in all about 335 miles in length, as it had done since said 6th day of April, 1880.

3. At the time of the creation of plaintiff in error, and of the Michigan corporations merged in it, the statutes of the State of Michigan authorizing the organization of such corporations and prescribing their duties, etc., empowered railway corporations generally, including the plaintiff in error, to regulate the tolls and compensation to be paid for the transportation of passengers and property, but provided that "such compensation for transporting any passenger should not, except on railroads operating less than twenty miles of road, exceed the following prices, viz: For a distance not exceeding five miles, four cents per mile; for all other distances, not exceeding three cents per mile." *Howell's Statutes, Sec. 3323.*

4. On June 28, 1889, there was passed by the Legislature of the State of Michigan, and approved by the Governor thereof, an act amending said section 3323, Howell's Statutes, so that the portion above quoted should read as follows:

"For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the Commissioner of Railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile; and for all companies the earnings of whose passenger trains, reported as afore-

said, were over two thousand dollars and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile; and for all companies whose earnings, reported as aforesaid, were less than two thousand dollars per mile of road operated by said company, three cents per mile: *Provided*, That in future, whenever the earnings of any company doing business in this State, as reported to the Commissioner of Railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case said companies shall thereafter, upon the notification of the Commissioner of Railroads, be required to only receive as compensation for the transportation of any passenger, and his or her ordinary baggage, not exceeding in weight one hundred and and fifty pounds, a rate of two cents and a half, or two cents per mile, as hereinbefore provided: *Provided*, That roads in the Upper Peninsula which report, as above provided, passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile;" being act No. 202 of the Laws of Michigan of the Session of 1889.

This act became operative October 2, 1889.

5. On the 3d day of October, 1889, the defendant in error brought suit against the plaintiff in error, in the Circuit Court of Michigan for the county of St. Clair, alleging that on the 2d day of October, 1889, he had desired to go upon the railway of the plaintiff in error, from Port Huron to Battle Creek, Michigan, the distance being 159¾ miles, and demanded of the ticket agent of plaintiff in error at Port

Huron a ticket for said journey, tendering to him therefor the sum of $3.20, in legal tender silver coin of the United States, which sum was at the rate of two cents per mile; alleging that plaintiff in error, by reason of the amount of its earnings, was subject to the provisions of said Act, No. 202 of 1889, of Michigan, which limited its tolls and fares to two cents per mile, but that said agent refused to accept such sum or to sell him a ticket therefor; and thus prevented him from making his journey; to his great injury, etc., etc.

The plaintiff in error pleaded a general denial.—Record, pp. 2 and 3.

6. On the trial of the cause in the State Circuit Court, the defendant in error adduced evidence tending to prove his case; and on behalf of the plaintiff in error it was admitted, by stipulation, that at the time of the application of the defendant in error for a ticket, as alleged by him, the regular fare charged and exacted by plaintiff in error of all persons, and paid by them, from Port Huron to Battle Creek, was $4.80, that being at the rate of three cents per mile; and that the rate had been the same for more than five years immediately preceding.

That the capital stock of the plaintiff in error was $6,600,000, which had been fully paid in. That the bonded debt of plaintiff in error was $12,000,000, of which one-half bears interest at the rate of six per cent. per annum, and the other half at five per cent., both being payable semi-annually; and that no part of said bonded debt matures earlier than the year 1900.

That said $18,600,000 represents money actually invested in said railroad and property, and is less than the actual value of the same.

That plaintiff in error owed also an unfunded debt of $896,906.40, bearing interest at five per cent. to six and three-quarters per cent. per annum. Part of said debt was for improvements to property, and part for bond interest not earned and paid in previous years.

That the total earnings and income of the plaintiff in error from all sources for the year 1888 were $3,228,338 17

Of this amount there was received—

From passenger traffic the sum of	1,065,502 94	
And from freight traffic the sum of	2,160,180 23	
From miscellaneous sources	2,655 00	
Total		$3,228,338 17
That the operating expenses of plaintiff in error for the year 1888 were	$2,404,516 54	
The interest paid on its bonds was	661,335 36	
Other necessary expenses, including interest on part of the unfunded debt, rental of cars, tracks, etc	150,305 61	$3,216,157 51
That in addition to the foregoing expenses, plaintiff in error paid during the year 1888, from its earnings, on account of interest on bonds not paid in previous years	12,257 94	
		$3,228,415 45

That the foregoing are fixed charges, which can only be diminished in future out of the earnings of the road, or by increase of capital.

The plaintiff in error introduced evidence (which was uncontradicted) tending to show that the legislative act in

question (that of 1889) would have the effect of depleting its revenue to the amount of the reduction effected, or nearly so.

7. Judgment was rendered in the cause in favor of the defendant in error and against the plaintiff in error, in the sum of $101. The Circuit Court overruled the defense and sustained the validity of the act in question.—Record, pp. 5, 6, 7, 8, 9, 10 and 11.

The plaintiff in error claimed in the trial court, among other things, that said Act No. 202 of 1889, in the view taken of it by the court, was invalid because repugnant to the fourteenth amendment of the Constitution of the United States, which provides that "No State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." And further that said act infringed the 10th section of article I. of the Constitution of the United States, which prohibits the passage of any law impairing the obligation of contracts.

The plaintiff in error removed said judgment and record to the Supreme Court of the State of Michigan, and that court affirmed the ruling of the Circuit Court and the validity of the act, holding that it was not repugnant to either of said provisions of the Constitution of the United States.—Record, pp. 15 to 37.

The Circuit Judge charged the jury as follows:

"I charge you, gentlemen, that by Act No. 202 of the public acts of this State of 1889, all railroad corporations

owning or operating railroads in this State, the gross earnings of whose passenger trains, as reported to the Commissioner of Railroads for the year 1888, equalled or exceeded the sum of three thousand dollars for each mile of road operated by said company, were required to transport passengers at the rate of two cents per mile.

"It is admitted that the defendant's earnings per mile, as reported to the Commissioner, exceeded that sum.

"It is claimed by the defendant that this law is unconstitutional and void, but I charge you the law is valid, and that under that law the defendant was bound to transport the plaintiff at the rate of two cents per mile, and for its refusal so to do the plaintiff may recover, and it is for you to assess his damages at such sum as you think him entitled to under all the circumstances, and such as will compensate him for the injury he is shown to have sustained."—Record, p. 11.

It will be observed that the testimony submitted on behalf of the plaintiff in error tending to show, if not absolutely demonstrating, that the rate of two cents per mile prescribed by the statute was unremunerative and unreasonable, was not permitted to be considered by the jury, the court holding that the question of the reasonableness of rates was for the Legislature to determine. The effect of the charge was, not only to hold the act of the Legislature fixing the maximum rate of fares at two cents per mile valid, and the carrier bound to carry at that rate, but to hold further that is was not open to the carrier to show that the rate was unremunerative. The only matter left to the jury was the assessment of damages.

The Supreme Court of Michigan, in sustaining this instruction of the trial court to the jury, say:

"The constitution of this State, enacted, as before said, before the organization of this defendant corporation, has given the Legislature power to, from time to time, pass laws establishing reasonable maximum rates of charges for railroad transportation. Who is to judge of the reasonableness of such legislation, of the rates so fixed? Is it to be decided by the courts, not only upon each separate act of the Legislature, but also in the case of every railroad company, and also in the case of every person who brings suit for a violation of the law against such company? If so, the courts will not fail of business, nor will the result of a determination of facts by juries, to which the Court must apply the law of reasonableness, be always harmonious or consistent. * * * * * *We think the intention of the people in this constitutional enactment was to authorize the fixing of reasonable maximum rates exclusively by the Legislature.* Then the result is certain and definite. The law is known, and there is no necessity for litigation, and there can be no different determination in like cases. *If injustice shall be done by the Legislature, the remedy lies in the good sense of the people, and not in the courts.*"—Record, pp. 32–3.

Thus the Supreme Court of Michigan sustained the trial judge, and held that the statutory rate of fare is conclusive against the carrier and beyond the power of judicial inquiry as to its reasonableness.

It is this ruling of the Supreme Court of Michigan that constitutes the alleged error complained of.

No question of State practice can be raised here, in respect of the instruction to the jury asked for and refused, or the exception taken to the instruction given. There was no dispute in the trial court as to the facts; there could not successfully have been. The Court and the counsel for the defendant in error were compelled to concede them to be true as they appear in the record. All of the important facts constituting the defense appear in the printed Annual Report of the Railroad Commissioner of Michigan for the year 1888.

The Supreme Court of Michigan, like the trial court, held that the rate prescribed by the legislative act, no matter if ruinously unremunerative—absolutely destructive of the company's interest in the property—was conclusive, and that the question of fact as to the reasonableness of the rate under the act in question was not open to judicial inquiry. The legislative intent to fix the rate beyond the power of any court to inquire into its reasonableness is manifest on the face of the act.

The record in this case, therefore, presents the identical question that was involved and decided by this Court in *Chicago, Milwaukee & St. Paul Ry. Co. vs. State of Minnesota*, 134 U. S., 418.

That case arose on an act of the State of Minnesota, which conferred on the Railroad and Warehouse Commission power to determine the reasonableness of railroad rates, on complaint of interested parties, and, when found

unreasonable, to prescribe rates that should be reasonable. The Supreme Court of the State construed the act as making the rate prescribed by the Commission conclusive upon the carrier, equally as if the rate were specified in the act of the Legislature itself.

On complaint made as to certain milk rates, the Commission found against the railway company, and issued an order reducing the rates. The railway company disregarded the order, and on application to the State Supreme Court, a *mandamus*, after full hearing, was awarded against the company. The case came into this court on error. This court, assuming the construction of the act by the State court to be correct—namely, that the rates fixed by the Commission were conclusive as to reasonableness, say:

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. * * * In the present case the return alleged that the rate of charge fixed by the Commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for

transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is *eminently a question for judicial investigation, requiring due process of law for its determination.* If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place *in the absence of an investigation by judicial machinery*, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

The constitutional principle affirmed in this judgment is, we submit, fatal to the Michigan act, which is a legislative attempt to arbitrarily prescribe the carrier's maximum rates. It does not make the rates named simply *prima facie* reasonable, but conclusively so, and both the carrier and its patrons are deprived by it of the right to show that the rates thus fixed are unreasonable. And this was precisely the point the court below decided, holding that the act admitted no judicial inquiry into the matter of reasonableness of rates, and that it was valid.

The opinion of this court in the Minnesota case was cited to the Supreme Court of Michigan, and fully considered by it. The conclusion of that court in respect of the question determined by this court was, "that the decision in the Minnesota case rests, not on the right of the Legislature to declare what is a reasonable maximum rate, but upon its right to authorize a commission to do so."

The Minnesota act, instead of fixing the rate of charges, undertook, with some sentiment of justice, to confer the power on a Commission ; and the act, though less tyrannical than the act of Michigan, under the construction put upon it by the Supreme Court of the State, when followed and executed by the action of the Commission prescribing the rate, stood before this court precisely as the Michigan act now stands here. The Legislature of Minnesota, together with the Commission which it vested with certain of its own claimed functions, prescribed a tariff of rates, without leaving open to the carrier or the shipper the right to show, in a judicial proceeding, that this tariff of rates was unreasonable.

The Legislature of Michigan, without the intervention of a Commission, prescribed the rate, and, more certainly than in Minnesota, deprives the carrier of the right of a judicial determination, or any other determination, of its reasonableness. The result is the same in both cases, though more sharply tyrannical in this. The property of the carrier might be thus confiscated, under both acts equally, without the possibility of judicial relief.

With respectful deference to the Supreme Court of Michigan, it is submitted that the question of the delegation of legislative power played no part in the judgment pronounced by this court in the Minnesota case. It had been held by the Supreme Court of Minnesota, in legal effect, that the act did not confer judicial power on the Commission. This court, accepting that construction of the act, adjudged it invalid.

If the Commission was not given judicial power by the act, and the Legislature of Minnesota intended to withhold it—which was the conclusion—which of the two other gov-

ernmental functions of the State was it intended by the act to confer on the Commission? It must either have been the legislative or the executive. That it could not have been the latter is too evident to require argument, for the duty imposed on the Commission possessed none of the essential qualities of executive functions; and if it were a judicial function, the result would be still worse for the validity of the act. But the duty of regulating rates of transportation within constitutional competence is clearly legislative in its character. It follows that the intent of the act was to clothe the Commission with a legislative function; or a function, by whatever name, that exerted the will of the Legislature, regardless of any judicial inquiry; and this court, having held that the exercise of this function by the Railroad and Warehouse Commission, in fixing rates in the terms of the Minnesota act, was a violation of a constitutional right of the carrier, the conclusion is irresistible that a State Legislature cannot constitutionally accomplish the same result by dispensing with the agency of a commission and itself fixing the rates in like terms.

In other words, the reasonableness of rates being a judicial question as affirmed by this court, it logically and necessarily follows that it is not permissible for a department of the government which is clothed only with legislative power, to prescribe a tariff of rates in respect of an existing lawful business, without leaving open to the carrier the right to have its despoiling tyranny or reasonableness judicially determined. And any legislative act which operates to foreclose this right of the common carrier to show that the rates prescribed are ruinous to its business and property, is invalid.

The Supreme Court of Michigan, while evidently embar-

rassed by the opinion of this court in the Minnesota case, thought it found support for its judgment in what had been said by this court in the following cases :

Munn vs. Illinois, 94 U. S., 113.
C., B & Q. R. R. Co. vs. Iowa, 94 U. S., 155.
Peik vs. C. & N. W. Ry. Co., 94 U. S., 164.
C., M. & St. P. R. R. Co. vs. Ackley, 94 U. S., 179.
Ruggles vs Illinois, 108 U. S., 526.
Stone vs. Farmers' L. & T. Co., 116 U. S., 307.
Dow vs. Beidelman, 125 U. S., 680.
Georgia R. R. &c , Co. vs. Smith, 128 U. S., 174.

In the *Munn* case the question of whether or not the rates fixed were reasonable was not involved. Therefore, what was there said by the learned late Chief Justice about legislative power was *dictum* merely.

In the case of the *C., B. & Q. R. R. vs. Iowa*, the bill charged that the rates were unreasonable, but it does not appear that the answer admitted the truth of the averment. It probably did not. Apparently the case was heard on bill and answer without proof. The briefs of counsel do not show that the question involved in the Minnesota case, and here under consideration, was raised or discussed.

In the case of *Peik vs. Chicago, &c., Ry. Co.*, the question seems to have been fairly raised by the issue, but was treated, in the Chief Justice's opinion, as disposed of by the decision in the *Munn* case, where, as I have pointed out, the question was not involved.

And the same is substantially true of *Chicago, &c., R. R. Co. vs. Ackley.*

In *Ruggles vs. Illinois*, the simple question at issue was whether the carrier was exempt from a general law of the

State respecting rates, by virtue of a certain provision in its charter.

The next of this series of cases in this court is that of *Stone vs. The Farmers' Loan and Trust Co.*, in which the only question raised appears to have been as to whether or not the charter of the railroad company saved it from legislative interference with its right to make its own passenger and freight rates. The question was decided adversely to the carrier, and the Chief Justice, in his opinion, referring to the before named cases previously decided (p. 331), uses the following significant language:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the Commission, and the statute of Mississippi expressly provides 'That in all trials of cases brought for a violation of any tariff of charges, as fixed by the Commission, it may be shown in defense that such tariff so fixed is unjust.'"

In the case of *Dow vs. Beidelman*, 125 U. S., the question was raised; but the case was disposed of without deciding it, for the reason that the evidence of the amount of capital invested was not sufficient. But what was said by the late Chief Justice, and above quoted in the Stone case, is referred to and approved.

In *Georgia R. R., etc., Co. vs. Smith*, 128 U. S., 174, the only question within the issue was whether the charter of the carrier, in respect of rates, amounted to a contract between it and the State, by which the State had parted with any power of control in the premises. Whether the rates prescribed were reasonable or not was not involved. But here, again, this court took pains to state the limitation upon the Legislature in the exercise of its power to prescribe rates of transportation.

The argument of the Michigan court for the exercise of this arbitrary power by the Legislature, that the result of a jury's finding, in any case, may be uncertain, that it may be different in different cases, and that a judgment in any one case will settle only the rate questioned in the particular case, and for the parties to it, etc., etc., might properly and pertinently be addressed to a legislative body in support of a law making provision for judicial inquiry into and settlement of all the rates of a carrier in a proceeding by the State, on relation of any person interested and claiming that the rates are unequal, or, in any respect, unreasonable, but, we respectfully submit that the argument is out of place here. A judicial inquiry is devoted exclusively to ascertaining what the law *is* and not to what it should be.

For several hundred years in England, and in this country down to a very recent period, the question of the reasonableness of transportation rates has been uniformly recognized to be a judicial question; and, so far as anywhere appears, there have never been manifested in practice any of the embarrassing difficulties which the Michigan court imaginatively set forth.

After diligent search we have been unable to find that the British parliament ever assumed to exercise the power, legislatively, of fixing the rates of transportation for common carriers. The act referred to by the late Chief Justice in the case of *C., B. & Q. R. R. Co. vs. Iowa* (3d W. & M., cap. 12., sec. 24), and which will be found in *Bacon's Abridgement, Cit.* "*Carriers*," (*D*), was as follows:

"That the justices of the peace of every county, and other place within the realm of England, or dominion of Wales, shall have power and authority, and are hereby enjoined and required at their next respective quarter or general sessions after Easter Day, yearly to assess and rate the prices of all land-carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdictions, by any common carrier or wagoner; and the rates and assessments so made to certify to the several mayors and other chief officers of each respective market town, to which all persons may resort for their information; and that no such common wagoner or carrier shall take, for carriage of such goods and merchandises, above the rates and prices set, upon pain to forfeit, for every such offense, the sum of five pounds, to be levied by distress and sale of his and their goods, by warrant of any two justices of the peace where such wagoner or carrier shall reside, in manner aforesaid, to the use of the party grieved."

The duty with which the justices were here charged in respect of common carriers, involved the exercise of a judicial function, and certainly there is no presumption that these justices proceeded "to assess and rate the prices of all land carriage of goods" without affording to the carriers opportunity to be heard.

But if the action of the justices were not judicial, but

administrative, can it be doubted that the reasonableness of these rates would be open to inquiry in a suit at law? If the authority to fix the rate was administrative, the statute implied that it must be reasonable.

But if this were otherwise, this English statute has no just application to the questions here. It was directed to a kind of business the cessation from which involved no destruction of property or of its use. The horses and wagons and men could engage in other employments, and the carrier was under no obligation to engage in or continue the business. Here the railroad company *must* "*do or die.*" It *must* run its trains and keep up the works in good condition, or forfeit its charter. And it cannot resort to other employments of the property. There is, it will be seen, no analogy.

The present *Railway and Canal Traffic Act* of England does not fix the rates to be charged, but simply prescribes general principles which the courts are to apply in determining the reasonableness of the rates charged by the carriers.

The Congress of the United States, in the enactment of the Interstate Commerce law, recognized the proper limit by simply laying down general principles in respect of rates to be charged, leaving to the courts their enforcement. There was no assumption of the power to prescribe what rates the carrier should charge; the power to fix rates was not even conferred on the Interstate Commerce Commission. That tribunal can only pass upon the reasonableness of a rate which the carrier has put in force, and only this on citation and hearing. And after that the courts, in cases of contest, may review the whole matter.

There is no aid to this legislation discernible in the provision of the Michigan constitution giving to the Legislature power to establish "reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State," etc.—*Michigan Constitution, Art. XIX—A.*

In the first place, it is not apparent on the face of this provision that it was the intention to make the Legislature the final arbiter of what are reasonable rates. The opposite is rather the legitimate inference from the use of the qualifying word "reasonable." Otherwise the word plays no part. But the Supreme Court of Michigan has held differently.

In the second place, the people, by a constitutional provision, have no more power than the Legislature has to convert a governmental function which is essentially judicial, into a legislative function, where the effect of such conversion is to violate a constitutional provision of the United States. A State Legislature cannot get power to confiscate the property of a citizen by any general or special act, through a professed constitutional grant from the people of the State.

In Michigan, as in the other States generally, powers of government are divided into three distinct departments, legislative, executive and judicial.—*Art. III, Sec. 1.*

Legislative power is vested in a senate and house of representatives.—*Art. IV, Sec. 1.*

And, by *Art. VI, Sec. 1,* it is provided as follows:

"The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the Legislature in cities."

These are original and fundamental provisions of the constitution.

It is evident that there was no intention by this amendment of 1870 in reference to rates of charges for transportation, to confer judicial power in respect of that subject, on the Legislature. And such is not its effect.

In the recent case of *The People vs. Cummings*, 50 N. W. Rept., 310, the Supreme Court of Michigan held an act of the Legislature unconstitutional which authorized the sentence of persons convicted of crime for an indefinite period, and gave to a board of prison inspectors the power to limit the period, but provided that the period should not extend beyond the time prescribed by statute. The Court (p. 311) say: "The judicial power of this State, by the constitution, is vested in certain specified courts, and the pardoning power is vested absolutely in the Governor of the State."

In this connection, while I do not deem it important in any bearing it can have upon the legal question under consideration, a statement made by the Supreme Court of Michigan in reference to the date of organization of the plaintiff in error may be misleading. The Court, in considering the effect of this constitutional amendment of 1870, state—what nowhere appears in the record—that the plaintiff in error was organized subsequently to that date. This is literally true—but it is not all the truth. The plaintiff in error corporation is composed of several other corporations, the result of consolidation between them, pursuant to the laws of the State of Michigan; and the corporations thus consolidated, and whose property, property rights and franchises the plaintiff in error succeeded to and now owns and controls, were incorporated, and constructed and operated this railroad throughout its entire length in

the State of Michigan—with the single exception of one section of it consisting of about fifty miles, between the city of Flint and the city of Lansing—prior to 1870. The facts, in respect of this, are matters of public record in the State of Michigan, and are therefore verifiable by this court.

Consolidation of railway corporations in Michigan is authorized by the statute, and is effected by an agreement between them. The statute then provides as follows:

"And all and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, and all and singular their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the right of way, and all other rights of property, in the same manner and to the same intent, as if said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporation; and the titles and the real estate acquired by either of said two or more corporations shall not be deemed to revert or be impaired by means of anything in this act contained."

Commissioner of Railroad's Compilation, 1890, page 34, paragraph 69.

Therefore, whatever rights, in respect of such legislation as this, the corporations which existed prior to the constitutional amendment of 1870 would have, had these constituent corporations remained in the ownership and operation of the road, the plaintiff in error now has and may assert.

But how can it be material to the question of the validity

of this legislative act whether the railway company affected by it was organized before or after the constitutional amendment? It is evident—

1st. That this constitutional amendment was not intended to confer any judicial function on the Legislature; the construction put upon it by the Supreme Court of Michigan in its decision of this case in effect so holds; and

2d. That the act in question is in its character and terms purely legislative, and implies the exercise of none of the elements of judicial functions by the Legislature.

If the plaintiff in error had come into being after this constitutional amendment, and possessed none of the rights and franchises belonging to its constituent members,—which existed and were operating the railroad prior to the amendment,—we should still have the case here, equally as now, of the State depriving the carrier of its property (a reasonable rate of transportation), without due process of law, by a legislative act which also has the effect of denying to the carrier the equal protection of the law.

We submit that the law is not guilty of a presumption that the railway companies of Michigan which have been organized since this constitutional amendment of 1870, have provided capital and constructed their railroads with an implied assent to the power and legal right of the State to confiscate their property! Such a presumption seems to be the implied basis of all that is said by the Supreme Court of Michigan on this point.

We claim that railroad corporations organized under the general laws of Michigan take their being under an implied

contract that the State shall not reduce their tariff of passenger and freight rates in the exercise of either its common law powers or the constitutionally reserved power to repeal, alter or amend, so as to destroy the property embarked in the business, or to deprive these corporations of the ability to earn a reasonable profit on the capital invested, which in effect is the same thing.

That the Legislature cannot authorize the taking of the property of such corporations without just compensation, is well settled.

In *Detroit vs. Detroit, etc., Co.*, 43 Mich., 140, where the plank road company had a charter, in which the right was reserved to "alter, amend or repeal," and the Legislature had passed an act which authorized the city to require the tollgate of the company to be removed outside of the city limits, it was held that the act was invalid. The Court (p. 147) say: "But there is no well-considered case in which it has been held that a Legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied, where the interest involved seemed insignificant. The case of *Albany, etc., R. R. Co. vs. Brownell*, 24 N. Y., 345, is an illustration. It was there decided that although the Legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden except in connection with provision for compensation. The decision was in accord with that in *Commonwealth vs. Essex Co.*, 13 Gray, 239, 253, in which, while the power to alter, amend or repeal the corporate franchises was sustained, it was at the same time declared that "No amend-

ment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

Again: "And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always."

In the case of the *Chicago & Grand Trunk Railway Company vs. Hough*, 61 Mich., 507, an act was held invalid which sought to impose on railroad companies the obligation to open and maintain highway crossings over their tracks at their own expense. On page 508, it is said: "The constitution expressly forbids any appropriation of private property, without 'just compensation.' There is no power in the Legislature to create any exception to this rule, and nothing is just compensation which does not make good all the pecuniary loss or outlay occasioned to the owner by the appropriation of his property."

In *Grand Rapids, etc., R. R. Co. vs. Grand Rapids & Indiana Railroad Co.*, 35 Mich., 265, an act of the Legislature which undertook to grant the right to one railway company to cross the tracks and right of way of another, without first making compensation, was held to be invalid, and Judge Marston (p. 270) uses this language: "Now, without attempting, at present, to define the power of the Legislature, under the clause of the constitution referred to, it has never yet been claimed that the Legislature under this reserved right could take the property which the corporation had acquired, by purchase or otherwise, and give it to third par-

ties, or authorize its being appropriated by or for the use of the public, without compensation being made therefor."

See also Toledo, etc. Ry. Co. vs. Detroit, etc., R. R. Co., 62 Mich., 564.
People vs. L. S. & M. S. Ry. Co., 52 Mich., 277.

This point is so well established as a fundamental principle of the law of this country, State and national, that there is no excuse for multiplying authorities to it; and the principle must remain in all its strength under the protective shield of a just and conservative judiciary, so long as the rights of private property are menaced by well-meaning but thoughtless legislation.

The principle implies and involves the main proposition of our argument as to the limitation of the State's power to prescribe an unreasonable maximum of railroad rates for carrying passengers and freight, as we shall more fully hereinafter attempt to show.

But the constitutional right of these carriers goes further than this. It is not denied that the Legislature of Michigan may prescribe a maximum rate for them, but the claim is that in doing this their right to a reasonable compensation must not be trespassed upon, and that the way must be left open for a judicial determination of this. What is the test of reasonable compensation we shall hereinafter consider.

The English cases will be searched in vain to find any statement of the principle that the sovereign power can regulate rates of charges for the use of property "affected with a public interest," in the unlimited terms of the language used in some of the American cases. Chief Justice Waite, in *Munn vs. Illinois*, quotes from Lord Hale's Treatise

"*De Portibus Maris*" the following: "If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, * * * * * or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and *excessive* duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be *reasonable* and *moderate*, though settled by the king's license or charter."

It appears from this that even sovereignty itself could not grant unreasonable rates beyond the power of judicial relief.

In *Alnutt vs. Inglis*, 12 East., 537, Lord Ellenborough said: "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on *reasonable* terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a *reasonable* compensation for such warehousing. And, according to him, wherever the accident of time casts upon a party the benefit of having a legal monopoly

of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take *reasonable* compensation only for the use of the wharf."

And so, in the same case, Le Blanc, J.:

"The privilege, then, of bonding these wines being at present confined by the act of parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but only a *reasonable* rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist upon its being *reasonable* for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent." Here was involved and under judicial determination the simple question of the reasonableness of the charges.

See the learned opinion of Justice Story in the *Charles River Bridge* case (11 Pet., 584), for a review of English cases respecting the grant of ferry, market, bridge and other privileges by a king to a subject, and the limitation on the power of the sovereign to impair these grants by a subsequent grant to others.

In the matter of the *Islington Market Bill*, 3 Cl. and Fin. R., 512, a bill was pending in parliament for the establishment of a cattle market at Islington. It appeared that a charter had been granted by Edward III. to a corporation, in which the exclusive privilege was given for the maintenance of such a market at Islington, and within seven miles

of the place. Certain questions were submitted to the judges, among them one respecting the validity of a second charter granted to another for the maintenance of a cattle market at Islington.

The judges answered that the charter for a new market could not be granted, except by making compensation for the damages that might result to the previously chartered company.

It should be observed that the only effect of a new grant in this case, and in many of the other numerous English cases cited and referred to by Justice Story, would have been a reduction in the *profits* of the particular business involved. There was no taking of property in any other sense.

The judges said, in the *Islington* case: "We do not say that a writ of *ad quod damnum* is absolutely necessary. But if the Crown were to grant a new charter without a writ of *ad quod damnum*, and it should appear that the interests of other persons were prejudiced, the Crown would be supposed to be deceived, and the grant might be repealed on a *scire facias*."

While the power of parliament in the premises is theoretically supreme, there is apparent in the English cases a remarkable degree of painstaking never to exercise it to the degree of disturbing vested property rights. The *Islington* case well illustrates this. The actual point involved in the questions submitted to the judges there, was as to the exercise of parliamentary power, although the form of the question was as to the validity of a second grant by the king; and the power of the courts to grant relief, if the power were exercised by parliament, is affirmed.

There is a large class of American cases involving the power of the State to alter the organic act of corporations

under the reserved right to repeal, alter or amend, but these are not generally in conflict with the principle for which we contend. Some of them involve the exercise of the power of taxation; others the police; and still others the power of control respecting rates of charges and kindred matters. The case of *Spring Valley Water Works vs. Schottler*, 110 U. S., 347, is one of the latter class. There the general act under which the corporation was formed gave to the corporation the right to fix the rate of charges for water supplied. By an amendment of the State constitution this power was taken away and conferred on the municipalities. The Supreme Court sustained the constitutional provision. Mr. Morawetz, in his work on Private Corporations, vol. 2, Sec. 1095, in a note, makes the following significant observation in reference to this case. He says:

"It should be observed that the question did not arise in this case whether the rates established by the municipal authorities were less than reasonable rates. The company, having had the use of the power of eminent domain for the construction of its works, could not be empowered by any Legislature to charge more than reasonable rates."

We do not question the power of the State to repeal a general railroad law. This is constitutionally reserved, as is also the power to alter and amend. A distinction exists between the power of repeal and that to alter or amend. The power of repeal is absolute, as its exercise implies a fundamental change of sovereign policy. But the power to alter or amend is qualified by the very meaning of the words; and when the State clearly attempts to exercise this

power, it must keep within the scope of the meaning of the terms. It cannot destroy property or property rights. Mr. Morawetz, in his work already referred to, speaking of the reserved power of alteration, says: "It is often a difficult matter to determine how far the State has a right to interfere with the affairs of a corporation under a reservation of power to 'alter, amend or modify' its charter at pleasure. A reservation of this nature does not give the State arbitrary control over the rights and property belonging to a body of corporators. This is not the meaning of the words 'alter, amend or modify.' A material *change* in the enterprise of a corporation is not a mere *alteration* or *amendment*. An alteration under such reserved power must be *reasonable*, and it must always be consistent with the scope and object of the corporation as it was originally agreed upon.—*Sec. 1096*.

In the case of *Zabriskie vs. Hackensack, etc., R. R. Co.*, 18 N. J. Eq., 192, the following language was used: "The power of the Legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one and oblige the stockholders to accept it. * * * Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place."

In the case of *Close vs. Glenwood Cemetery*, 107 U. S., 476, Justice Gray says:

"A power reserved to the Legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or *substantially impair the object of the grant, or any rights vested under it*, and which the Legislature

may deem necessary to secure either that object or any public right."

The Supreme Court of Massachusetts, in the case of *Parker vs. Metropolitan R. R. Co.*, 109 Mass., 508, referring to this reserved power of alteration, say: "Whatever may be its limitation, it at least reserves to the Legislature the right to make any *reasonable amendments* regulating the mode in which the franchise granted shall be used and enjoyed, which do not defeat or essentially impair the object of the grant, or *take away any property or rights which have become vested* under a legitimate exercise of the powers granted."

Justice Swayne, in *Shields vs. Ohio*, 95 U. S., 319, 324, after saying that "where an act of incorporation is repealed, few questions of difficulty can arise," adds:

"The power of alteration and amendment is not without limit. The *alterations must be reasonable;* they must be made in good faith, and be consistent with the scope and object of the act of incorporation. *Sheer* oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases."

Railroads are "affected with a public interest," and the obligation resting upon their owners, as in the case of other property similarly affected, is to serve the public "for a reasonable compensation." The source of this duty is the common law. Their obligation to the public and the

reciprocal right of the public are well defined; the one has the right of service, and the other owes the duty of service—but only for a reasonable compensation. *The right of the public to the service is no more fixed or more sacred than is the right of the carrier to have a reasonable reward for it. Indeed, the right to the service is absolutely conditioned on the right of the carrier to a reasonable reward.*

If the power of the Legislature to prescribe maximum rates be conceded, this power is limited by the right of the carrier to a reasonable compensation, *and it is for the Court, in the last resort, to determine whether the rate fixed is reasonable or not; the question being essentially a judicial one, because it involves a higher question, namely, that of legislative power, which, under our system of government, is, and always must be, a judicial question.*

Mr. Pierce, in his work on Railroads (p. 466), says: "The police power, so far as regulating rates for transportation is concerned, has been sometimes limited to the prohibition of *unreasonable* charges and discriminations, leaving to the courts to decide, as a judicial question, what charges and discriminations are of that character;" and he refers to the following cases:

Phil. W. & B. R. Co. vs. Bowers, 4 Houst., 506.
Sloan vs. Pac. R. Co., 61 Mo., 24.
Ladd vs. Southern Cotton Press, etc., Co., 53 Tex., 172.

It is one thing to regulate, and quite another to annihilate. The legislative power to do the former does not carry the power for the latter. In the language of the learned Chief Justice already quoted, "This power to regulate is not a power to destroy."

In the case of *Chicago & N. W. Ry Co. vs. Dey et al. Rail-*

way Commissioners, 35 Fed. Rep., p. 866, Judge Brewer (p. 878), after having quoted from the opinions of this Court in the several cases already referred to, including that of *Stone vs. Trust Co.*, uses the following language:

"It is obvious from these last quotations that the mere fact that the Legislature has pursued the forms of law in prescribing a schedule of rates does not prevent inquiry by the courts; and the question is open, and must be decided in each case, whether the rates prescribed are within the limits of legislative power, or mere proceedings which in the end, if not restrained, will work a confiscation of the property of complainant."

The case of *Pensacola & Atlantic R. Co. vs. Florida* (Sup. Ct. of Florida), Vol. 2, Interstate Commerce Reports, 522; arose on demurrer to pleading. The State Commissioners had prescribed a passenger rate, pursuant to authority conferred upon them by an act of the Legislature. The company charged more than the rate fixed, and hence the suit by the State. The plea alleged that if the company should adopt the rate prescribed, or charge less than that complained of in the declaration, it could not pay the expenses of operating its road. The demurrer was overruled, the Court holding that the rate of the Commissioners was unreasonable, and amounted to an infringement of the provisions of the declaration of rights of that State against depriving persons of property without due process of law and against the taking of private property without just compensation. The Court say (p. 530):

"Confining ourselves to the case made by the pleadings, where only one railroad is shown to traverse the territory in question, and on the one hand the Commissioners say the company must not charge more than three cents, although

it will compel a loss of money, and the company says it cannot pay operating expenses at the rates of freight and passenger charges prescribed by the Commissioners, or without charging 4 11-26 cents per mile, our opinion is that the action of the Commissioners, in prohibiting the larger rate, is a palpable abuse of their discretion and a trespass upon the rights of the company, and one which, *if enforced, with the freight rates prescribed, would amount in law and in fact to taking the property of the company without just compensation. It is not a reasonable rate, considered either with reference to the interests of the people or those of the railroad company, or both.*"

The Court in that case was not called upon to determine whether the Commissioners would have power to limit the rate to that which would produce a sum equal to paying the operating expenses.

On page 528, it is said:

"To earn money is a proper and legitimate object of a railroad company. Though a public highway and subject to public control as such in many respects, yet it differs from the ordinary public highway in the feature of being private property. A railroad and its equipment represent the private capital invested in them, and the income from the operation of the same is looked to and relied upon for the expense of at least the maintenance and operation."

The *American Coal Co. Case* (46 Md., 15) is not in conflict with this position, for the reason that the case did not involve the question of reasonableness of rates. There was nothing to show that the rates prescribed would not produce adequate revenue to pay the expenses of operating, and a just reward to the owners of the road for performing the service. The court there say, referring to the reserved

power to alter and amend: "The court cannot *presume* that the power will be exercised by the Legislature arbitrarily or unjustly."

In our case the court is saved the necessity of any presumption on the subject, for it conclusively appears that the power has been "arbitrarily and unjustly" exercised. And the bald question is presented of whether this can be done without power of relief in the court. Have we drifted back through the process of legislative assumption, on the one hand, and of judicial interpretation, on the other, to the condition of irresponsible power in the law-makers in matters of this kind? If so, our fathers, in framing our system of government, did not build as wisely and well as we have been accustomed to suppose. The abuses of tyranny are no more tolerable when coming from the sovereign people, through their legislative representatives, than when they emanate from the uncontrolled decrees of a king. We do not contend for power in the court to disregard a legislative act on the broad ground of its injustice, simply, but only when, as in this case, the injustice involves an infringement of constitutional limitations, either embodied in express words or in well settled principles.

The reasons, based on consideration of the rights of the private capital invested, which require the courts to go to the extent named in the Florida case in protecting the corporation from such legislation, equally and inexorably demand that they shall go further, and protect the *value* of the capital to its owners. The logic of this position is unanswerable. The public interest may be protected by a rate of earnings that will keep the railroad in an efficient working condition, but, up to that point, the owners of the property get nothing; the public interest is secured;

but it is just at this point that the owners' valuable property rights begin.

In the early case of *Beekman vs. Saratoga, etc., R. R. Co.*, 3 Paige, 75, it was said that the privilege of taking tolls or charging passenger and freight rates for the service of transportation is a franchise.

In *Joy vs. The Jackson & Michigan Plank Road Co.*, 11 Mich, 165, Judge Christiancy said:

"Certain franchises—such, among others, as that of keeping a fair, a market or a ferry, and taking tolls—have generally been recognized as property."

In the *Detroit & Howell Plank Road case* (43 Mich., 140), the only property right of the company involved was that of taking toll within the limits beyond which the city sought to exclude it under the act of the Legislature.

Even a common law right of action is held to be property within the constitutional protection.

Dunlap vs. Toledo, etc., Ry Co., 50 Mich., 474.
Johnson vs. Jones, 44 Ill., 142.
Hubbard vs. Brainard, 35 Conn., 563.
Griffin vs. Wilcox, 21 Ind., 370.

Surely the right of a railroad company to a reasonable return on its capital must be equally as sacred.

In *Thorpe vs. Rutland, etc., Ry. Co.*, 27 Vt., 146, Chief Justice Redfield said: "The privilege of operating the road and taking tolls for fare and freight is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying profits therefrom arising, would, no doubt, be void."

The right of a railroad company to have compensation for its services incident to its business exists even without special grant of its charter.—*Rorer on Railroads*, 1347.

To deprive a carrier of this by a reduction of its rates, is just as effectually to appropriate to public use the capital invested as if the act in express terms provided that the railroad and property should be confiscated to the public. For with the rates reduced to a point where no surplus earnings are possible, all value of the property to its owner is gone. This is too self-evident to bear argument.

> "You take my house when you do take the prop
> That doth sustain my house; you take my life
> When you do take the means whereby I live."

says Shylock. And this is good law, as well as true in fact.

Considering what the right of a stockholder in a railroad corporation is, it seems like trifling with words and juggling with our senses to say that it is not a property right and within the constitutional protection. If the stock is not entitled to a reasonable dividend, it is worthless to the owner—worse than worthless, for its ownership binds him to certain duties to the public which may become personally onerous, and for which he can have no reward. He becomes an involuntary public benefactor, and does not even get the cheap reward of glory for it. He cannot shift the load upon others, even by sale or gift; for no one will buy the stock, or even accept it as a donation under such conditions. Death seems to be his only relief, and death must have a new terror added for him in the consciousness that he is leaving a burden instead of a blessing to his children. The State may not take the railroad from him and appropriate it to the public without providing for a compensation. This is prohibited. But it may appropriate the use of the road to the public in perpetuity, on terms that will prevent the owner from ever realizing

one dollar from the property. This must be the startling position which sustains the act in question. The bare statement of it shocks the understanding and conscience. It is in conflict with a common sense of justice, as it is with constitutional principles.

But this Court, in the Minnesota case, has definitely determined that to deprive the carrier of the power to charge reasonable rates for the use of its property is to deprive it of the property itself.

We submit that this act transcends the power of alteration or amendment—the power to regulate, which is its manifest purpose—and that, under the guise of this power, it effects a destruction of the vested property right of the railway company to a reward for its services, namely, a reasonable dividend on its capital invested.

As showing the condition of Michigan railroads generally, in respect of their ability to endure a reduction of rates, we quote the following from the printed argument of Hon. William L. Webber, which was submitted to the Michigan Supreme Court in this case :

"In the report of the Commissioner of Railroads in Michigan, for 1888, which is a public document, it appears that there were sixty-eight corporations reported, of which fifty-five were roads engaged in general traffic. Of the fifty-five but ten paid dividends upon the capital stock, the average of which, as to the ten, was 4.14 per cent. upon the capital stock paid in, while the residue of the capital stock invested amounted to $79,951,312.31, which, in the language of the Commissioner, 'yields no return to the owners

of the properties.' The Commissioner says: 'The vast sum of money invested in our railroads that yields no return to the capitalist, has, nevertheless, proved of the highest advantage to the State, in the development of its material resources, and especial care should be taken that no hostile legislation arrests the progress of our railroad system into the few remaining localities still unprovided with the means of moving their products, whether of the farm or forest, to the market centers.'"

Earnings which merely enable the carrier to pay operating expenses, together with the interest on its bond debt, which, in this case, represents only two-thirds of the actual capital invested, leaving nothing for the remaining one-third of the cost of the property represented by its real capital stock, are not a reward. To hold otherwise would be to sacrifice the substance of the principle while preserving its form. The cost of a railroad, like that of most other great business enterprises in this country, is almost universally represented by an interest-bearing bond debt and stock certificates. The rate of interest is determined by the state of the money market at the time the bonds are issued, and by the credit of the corporation issuing them. The aggregate of this interest becomes a fixed charge which the company must pay. The owner of the stock can only realize any return on his investment after all fixed charges (which include operating and maintenance expenses and interest debt) have been paid. If this principle of reward is anything more than mere sounding words—if it means anything of value, it must be held to protect these corporations in the right to such rates of charges as will afford them some return on their capital stock, after paying all fixed charges.

We might safely rest our case here ; for the uncontroverted and incontrovertible facts shown are that the rate prescribed does and must deprive the plaintiff in error of the power to earn anything toward a dividend on its cash paid-up stock —nay, worse than this, it cannot even discharge indebtedness for bond interest passed, because of inadequate earnings, in previous years !

If, then, the railway company is entitled to some reward for its services, of which the Legislature cannot deprive it, and this reward means anything in excess of a return of the bare expense incurred and paid in rendering the service, what is the test of its sufficiency—its reasonableness ?

In the case of *Chicago & N. W. Ry. Co. vs. Dey et al.*, already cited, Judge Brewer, considering the question of the limitation upon the power of the Legislature (p. 878), says: "The right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property *some* compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the Legislature is the sole judge."

He inferred this to be the conclusion of this Court.

We respectfully submit that such inference is not well founded, but, on the contrary, what is said in the case of *Stone vs. Trust Co.*, as to the limit of the power of the Legislature, fully sustains the position that the carrier is entitled to a reasonable return upon the capital invested. The learned judge then draws a parallel between the right of the railway companies in respect of the rate of compensation for services, and the right of the money lender to interest. He says (p. 879): "Take a kindred matter. It

is within the power of the Legislature to prescribe the rate of interest, and to punish by severe penalties the exaction of larger than the legal rate. What that legal rate shall be, is not for the courts, but the Legislature, to determine. Suppose the Legislature of Iowa should reduce the legal rate of interest to 1 per cent., although such legislation would prevent capital from coming into the State, would the courts have power to declare the law unconstitutional?"

There is a radical difference between the position of the railway companies and the money lender. It is not within the power of the Legislature to reduce the rate of interest so as to affect existing contracts. The lender of money is protected in his right to the legal rate of interest as it exists at the time the loan was made. If the Legislature could reduce the rate of interest so as to affect such loans, it would be exercising a power more akin to that which is claimed for it in support of the act under consideration. The making of a loan of money is optional. The situation of these railway companies is quite different. They were called into being by invitation of the Legislature. Capitalists at home and from abroad have been induced to invest their money in the formation of corporations and in the construction of railroads in the State of Michigan, in the aggregate amount of many millions of dollars. They nominally own the property, but it is dedicated to the public use. Whether it pays them any remuneration or not, so long as the railroad is self-supporting, its operation must be continued. As was said by Judge Emmons, in the *Pine Grove case* (1 Flippin, 144): "The road, once constructed, is *instanter*, and by mere force of the grant and law, embodied in the governmental agencies of the State, and dedicated to public use. All and singular its cars, engines,

rights of way, and property of every description, real, personal and mixed, are but a trust fund for the political power, etc."

The capital invested can never be reclaimed or recovered, except through surplus earnings over and above the operating and maintenance charges. While the holder and owner of the capital stock owes many duties to the public, his property right is substantially reduced to that of a dividend upon his stock.

Mr. Hare, in his work on American Constitutional Law (Vol. II., p. 771), says: "Difficult as it may be to fix the limit, we may presume that it would be transgressed by an act reducing the rates of a railway company below the sum requisite to defray current repairs and expenses *and leave a surplus equal to the legal interest on the capital expended in the construction and equipment of the road.*" This certainly would seem to be no more than a reasonable limitation of the legislative power, since it adopts the rule of compensation which the State has prescribed for its citizens generally as a just return for the use of money. The natural laws of trade and commerce, including that of supply and demand, may be safely left to take care of the general public interest, under the rule which secures to the common carrier the right to such rates as will afford a reasonable profit, such as the legal rate of interest on the capital invested. If the traffic will not bear this—that is to say, if there is not a sufficient margin in the selling price over the cost of production, with transportation added, to compensate the producer, the loss will fall, as it always has fallen in such cases, on the carrier. The railroads will continue to carry so long as they can pay expenses, and often when they cannot, as the history of their operation in this

country shows. It is the carrier, and not the general public, that suffers most when the prices of all marketable products are greatly depressed; and it is the carrier, and not the public, that stands in need of the Court's protection in this matter.

This Court has said: "The State cannot require railroad corporations to carry persons and property without reward." What is a reward? As we have already said, it is certainly not the bare payment of expenses incurred in the service. This does not come to the corporation or its proprietors, but goes to the employees and the material men, etc. To bring any reward to the corporation there must be a surplus of earnings over these expenses. It was evidently such a surplus that this court contemplated in the term "reward."

Mr. Hamilton, answering the question, "What is a reasonable traffic rate?" in an article in the American Law Review (Vol. 16, 449), says: "It is said that the stockholders of a railway have a legal right, not to whatever income the possession of a monopoly enables them to extort from the public, but only to such an income as will suffice to pay the current expenses of repairing, keeping open and operating the road, rolling stock and other accessorial instruments of conveyance—depots, delivery wagons, etc., and pay them, besides, a reasonable interest or profit upon their money invested. If this be true (and it is believed), reasonable traffic rates are such rates as if charged upon the traffic will produce the desired income."

In the case of *Carmarthen, etc., Ry. Co. vs. Central Wales, etc., Ry.*, 2 Ry. & Can. Traf. Cas., 23; 7 Nev. & Mac., 23, the right of the company to interest upon the cost or value of the property was conceded as the basis for settling the rate to be charged.

This question cannot be evaded by indulging in the speculative hypothesis that a reduction in the rate of fare will increase travel, or that the business will materially grow through increase of population, thus making good in the future the present loss of revenue resulting from the operation of this act. The Court must deal with the known and certain, with the present, and not the future. The validity of the act is to be determined by reference to what is, not what may be. As Justice Brewer has well said, "speculations as to the future are no guides for judicial action. Courts determine rights upon existing facts." It is not given to legislators or judges to look into the future, any more than to the rest of mankind. Many things may occur to affect the profits of the carrier in any increase in the volume of traffic, which cannot be anticipated and provided for. The Legislature in this act have made the past earnings the basis of future rates, and the act must stand or fall by this test.

While not claiming for it the effect of a contract obligation on the part of the State, there is a moral significance in the fact that the original general railroad law of the State, enacted in 1855, contained the following provision :

"The Legislature may, when any railroad organized under this act is opened for use, from time to time alter or reduce the rates of toll, fare, freight or other profits upon such road ; but the same shall not, without the consent of the corporation, be so reduced as to produce less than 15 per cent. per annum on the capital actually paid in ; nor unless on an examination of the amounts received and expended, to be made by the Auditor-General, he shall ascertain that the net income divided by the company from all sources for the year then last past shall have exceeded an annual income of 15 per cent. upon the capital of the cor-

poration actually paid in." (Sess. Laws Mich., 1855, p 170.) The law so continued until 1871, during which time many of the railroads which the act here complained of affects, were constructed.

It was this kind of legislation that invited foreign capital to the State for the construction of railroads. The act complained of illustrates how this pledged good faith of the State has been kept!

It must, we submit, be conclusively presumed that the State intended, when it authorized these corporations to be created, and vested them with power to build, equip and operate railroads, and equally that those who created the corporations and supplied the money to build and equip the roads expected, that passenger and freight rates would never be reduced by the State's action to a point that would deprive them of the ability to earn a reasonable return on the capital invested. On no other terms would any sane man invest money in such property. If this presumption is warranted, both in respect of the State and the incorporators of these railway companies, we have an implied contract on the part of the State against any reduction of rates which will take from these corporations the power of earning a reasonable dividend on the actual capital invested in their property, and, therefore, an implied contract against the reduction sought to be effected by the act in question.

We cannot conclude this brief more appropriately than by the following quotation from the opinion of Judge Jackson, recently pronounced at Cleveland, in the case of *The Cleveland Gaslight & Coke Company vs. The City of Cleveland.* The case is not officially reported, and the quotation is taken from a newspaper report of the opinion:

"If we reflect about it for a moment, we will see that those two features of the Constitution of the United States

—the prohibition against the impairment of the obligation of contracts, and * * * * the protection of persons and property against arbitrary action upon the part of the States, are the very fundamental principles upon which the preservation of this government must rest. If those constitutional provisions are not recognized by right thinking men, if they are not rigidly enforced by the Federal Courts, the government of these States would not stand together for ten years. There would be no machinery or power in the land to hold them together. If they may make war through their Legislatures and their delegated authorities upon vested rights and contract obligations, * * * * if they may be at liberty to deprive individuals or corporations of their vested rights and dispose of their property rights, this government could not stand—I mean as a government of free institutions, any more than a government might be called free that would undertake to take the services of the individual, that would undertake to fix the price at which he shall sell his goods, or at which he should render services to his fellow-men." * * * * "Neither the Government of the United States nor any State has the power or right to say what you shall charge for your services or for the products or goods that you may market, if you are not exercising a public privilege. If you are exercising a public privilege, then there is one limitation upon the power of regulation, and that limitation is that in the reduction of price or in the reduction of the compensation for services you must not go beyond the limits of reasonable compensation."

E. W. MEDDAUGH,
Attorney for Plaintiff in Error.

GEO. F. EDMUNDS,
Of Counsel.

§ 3323 HOWELL'S ANNOTATED STATUTES OF MICHIGAN.

§ 3323. *Am. 1877, p. 186, May 22, Aug. 22, Act 177.* SEC. 9. Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions following, that is to say:

First. To cause such examinations and surveys for the proposed railroad to be made as may be necessary to the selection of the most advantageous route for the road, and for such purposes, by its officers, agents and servants, to enter upon lands or waters of any person or company, but subject to liability for all damages which they shall do thereto;

Second. To receive, hold, and take such voluntary grants and donations of real estate and other property as shall be made to it to aid in the construction, maintenance, and accommodation of such road, but the real estate thus received by voluntary grant, shall be held and used for the purposes of such grant only;

Third. To purchase and, by voluntary grants and donations, receive and take and, by its officers, engineers, surveyors, and agents, enter upon and take possession of, hold and use all such lands and real estate, franchises and other property as may be necessary for the construction, maintenance and accommodation of its railroad and stations, depot and other accommodations; but the same shall not be appropriated until the compensation to be made therefor is agreed upon by the parties, or ascertained as herein prescribed, be paid to the owners, or deposited as hereinafter directed, unless the consent of such owner be given therefor;

Fourth. To lay out its road, not exceeding one hundred feet in width, and to construct the same, and, for the purpose of cuttings or embankments, and procuring stone,

gravel, or other material, [or] for the purpose of draining its road-bed, to take, in the manner herein provided, such further lands adjacent and in the vicinity of its road as may be necessary for the proper construction, operating, and security of its road;

Fifth. To construct its road upon or across any stream of water, water-course, private road, street, lane, alley, or highway, and across any plank-road, railroad, or canal which the route of its road shall lie along or intersect; but the corporation shall restore the stream, water-course, private road, street, alley, lane, highway, plank-road, railroad or canal, to its former state, as near as may be, but shall not materially obstruct the navigation of any stream, nor obstruct any public highway or street by cars or trains, for more than five minutes at any one time; and shall construct suitable road and street crossings for the passage of teams by fitting down planks between and on each side of the rails of such road, the top of which shall be at least as high as the top of the rails of such road; and in case of the construction of such railway upon any public street, lane, alley, or highway, the same shall be on such terms and conditions as shall be agreed upon between the railroad company and the common council of any city, or the village board of any village, or the commissioners of highways of any township in which the same may be; but such railway shall not be constructed upon any public street, lane, alley, highway, or private way until damages and compensation be made by the railroad company therefor to the owner or owners of property adjoining such street, lane, alley, highway, or private way, and opposite where such railroad is to be constructed, either by agreement between the railroad company and each owner or owners, or ascertained as herein pre-

scribed for obtaining property or franchises for the purpose of its incorporation, to be paid to the owner thereof, or deposited as hereinafter directed;

Sixth. To cross, join, and unite its railroads [railroad] with any other railroad now or hereafter constructed, under any law whatever, at any point on its route, and upon the grounds of such other railroad now or hereafter constructed, with the necessary turnouts, sidings, and switches, and other accommodations and conveniences in furtherance of the objects of its connections; and to make all such business arrangements as said companies may agree upon. And every company whose railroad shall be intersected by any other railroad shall unite with the owners of such other railroads in forming such intersections and connections, and grant facilities for the same, as hereinafter provided;

Seventh. To take, transport, carry, and convey persons and property on their said road, by the force and power of steam, animals or any mechanical power, or by any combination of them, and to receive tolls and compensation therefor: *Provided*, that in transporting freight by the car loaded by the shipper, and unloaded by the consignee, no railroad company shall charge for transporting each of such cars more than eight dollars for any distance not exceeding ten miles, nor more than fifty cents per mile for the second ten miles, nor more than twenty-five cents per mile for the third ten miles; and for distances exceeding thirty miles, in no case shall the charge between any two points on the said railroad exceed the minimum charge on the entire line. This provision shall not apply to the Upper Peninsula nor to any company operating less than fifteen miles of railroad.

Eighth. To erect and maintain all necessary and convenient buildings, stations, depots, and fixtures, and machin-

ery for the accommodation and use of their passengers, freight, and business, and to obtain and hold all the lands necessary therefor;

Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred pounds, shall not, except on railroads operating less than twenty miles of road, exceed the following prices, viz.: For a distance not exceeding five miles, four cents per mile; for all other distances, not exceeding three cents per mile; and no fare shall be less than five cents, and that amount in any case may be charged and collected; and the price of tickets may, for convenience in making change, be fixed for that multiple of five which is nearest the exact amount of the fare in each case, as fixed by the foregoing rates: *Provided*, that in the Upper Penninsula five cents per mile may be charged and collected on all railroads: *And provided further*, that the provisions of this act shall not apply to the Paw Paw railroad.

Office Supreme Court U. S.
FILED,
JAN 9 1892
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CASE No. 14,487.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1031.

THOMAS WELLMAN,
DEFENDANT IN ERROR,

ads.

THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY,
PLAINTIFF IN ERROR.

BRIEF AND ARGUMENT

OF

WM. T. MITCHELL,
Attorney and Counsel of
THOS. WELLMAN,
Defendant in Error.

MURRAY & MUSTARD, PRINTERS, PORT HURON, MICH.

Supreme Court

Of the United States.

THOMAS WELLMAN,
Defendant in Error.
ads.
THE CHICAGO & GRAND TRUNK RAILWAY,
Plaintiff in Error.

Brief of Defendant in Error.

This case coming from the Supreme Court of the State of Michigan where the facts and law were thoroughly reviewed and stated in the opinion filed and handed down by that court and made a part of this record, it seems unnecessary to make any further recapitulation or extended statement for the better information or understanding of this Court.

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It is desirable that the decision in this case should not be limited or in any manner controlled by any merely technical question, or failure in the assignment of errors, but that the broad questions involved, and the right or wrong of the act or law complained of be fully and finally determined and set at rest.

In any view that may be taken, does this act limit-

ing passenger rates to two cents a mile when the earnings of a railroad constructed under the general laws of the State, as authorized by the constitution, exceed three thousand dollars per mile, in any way conflict with the constitution of the United States? Or more properly, does that provision of the State constitution, which in terms authorizes the legislature "to pass laws establishing *reasonable maximum rates of charges* for the transportation of passengers and freight on different railroads in this State" (Art. XIX-A), conflict with, or in any way contravene any provision, in letter or spirit, of the Federal constitution?

If so, in what respect? And what particular provision, declaration or prohibition?

The objection in the trial court and the assignment of errors in the court below, the Supreme Court of Michigan, was simply that the act was unconstitutional, that is, as we understand, not warranted by, or in contravention of the State constitution.

It is somewhat difficult to see how this objection or assignment could or did raise the question of contravention or violation of the federal constitution. But we are not disposed to take so narrow an interpretation of the question, then as now involved, and treat it as if fully covered, then, as now by the assignment of errors in this court.

In these we are pointed to section 10 of article I, and article XIV of the Federal constitution.

Sec. 10, Art. I, among other prohibitions or limitations of the powers of a state, declares that "No state shall pass any * * law impairing the obligation of contracts."

In article XIV the several states are prohibited from depriving any person of life, liberty or property without due process of law, and from denying any *person* within its jurisdiction the equal protection of the laws. This is the only clause in the article that can be referred to as violated or infringed by the act in question, and we do not doubt that within the intent of the provision a railroad company or other corporation will and must be treated as a *person*.

To bring the act in question within either of these provisions, it must be claimed that in passing the original general railroad laws the state made a contract, or implied agreement, with every company or corporation organizing and constructing a railroad under the corporate powers thereby granted, that the legislature would not make any detrimental change in the rights granted or any new limitations of power.

The state constitution of 1850 providing that "corporations may be formed under general laws" prohibits their creation by special act, and also provides that "all laws passed pursuant to this section (Sec. 1, Art. XV.) may be amended, altered or repealed"

The general railroad laws of the state were first enacted in 1855, have been subjected to many amendments enlarging, defining or limiting the powers and privileges of companies formed under them, and also reserved the right of amendment.

This defendant corporation is formed out of several companies, all of whom had organized and built their

several parts of the road prior to the amendment of the constitution in 1870, (Art. XIX.–A.), but this defendant company, was formed after the adoption of that amendment, by the purchase and consolidation of the old companies into the new and larger corporation, and claims to have acquired all the rights and immunities held by them, the consolidation not affecting the original rights held by the several companies.

Article XIX.–A., adopted and ratified by the people in 1870, solely in reference to railroad corporations, was no doubt proposed and adopted to remove any possible doubt as to the control of the legislature of the rates of freight and prssengers to be charged by such companies.

We insist that this was a power fully provided for in the constitution, before and without this amendment, and that the old companies, and this company made by their consolidation, formed their associations and became corporations, fully understanding and in effect agreeing that the law of their being was subject to amendment and repeal, at the will af the legislature, even to the loss of any and all corporate powers; that this is a risk the defendant corporation voluntarily took upon itself, and it cannot complain of any breach or impairment of contract; nor that it is denyed the equal protection of the laws with all *persons* in the jurisdiction; nor that it has been deprived of property without due process of law, for, if deprived of any property or right, it is in accord with and pursuant to the law of its being freely accepted and agreed to.

The amendment of 1870 (Art. XIX.–A.), in force

when this defendant corporation received and accepted its franchise, upon the consolidation of the smaller corporations into this one, and which we insist must control as much as if embodied in its charter or corporate organization, declares it to be a fundamental law, that railroad companies shall be subject to an enactment by the legislature of a law, or laws, "establishing reasonable maximum rates for the transportation of passengers and freight on different railroads" and enabling the legislature to designate one or more or a class of railroads to be affected or controlled by such legislation, and to which the defendant fully assented and agreed by and in, accepting the powers and privileges so granted. In receiving the franchise and public powers, it agreed to all limitations that might be made by the legislature to which it owes its existence.

In the act complained of there is no class legislation. It affects all alike whenever the earnings are alike or have attained the prescribed amount per mile. The only limitation to the power and full control of the legislature, or to any enactment by it, must be found in the word "*reasonable*" as used in the provision "the legislature may pass laws establishing *reasonable maximum rates of charges*," &c., that is, the legislature is necessarily made the sole judge and arbiter of what is reasonable, or, if not, it must provide for some judicial determination of what is reasonable before it can establish by enactment a maximum rate of charges in any given case or in all cases.

Are the hands of the legislature so tied? Except the legislature is made the judge and given power by its own action to determine what is reasonable, it could only provide for some judicial investigation or outside determination, through independent machinery, subject to the caprice of juries or arbitrators, varying in every case, thus stripping the legislature of all power or discretion, and controlling it by verdicts or findings over which it or the State could have no control. If this is so, this constitutional amendment is a nullity and should be stricken out, not only as void, but as a farcical play upon words and language intended to be of controlling force.

I have endeavored to present, as briefly as possible, my views of the necessary conclusions that must be deduced from the constitutional provisions and laws under which the defendant company became a corporation or a person entitled to the equal protection of the laws, and hence, the unreasonable claims of the defendant corporation, without citing any decisions or authority tending to support or confirm my propositions.

I respectfully concur in the reasoning of Mr. Ellis, attorney general of the State, who at my solicitation, appears with me, and represents the State to sustain its legislature and its laws.

I most respectfully call the attention of this Honorable Court to the well considered opinions and careful, and full reasoning of Justices Morse and Cahill deciding the case in the Supreme Court of Michigan, desiring to refer to those opinions and authorities cited by them as a part, and the convincing part of my argument.

I can see no escape from the conclusions and judgment of that Court, nor how upon any reasonable theory any other result could have been reached, or how this Court can come to a different conclusion.

I respectfully submit that the judgment of the Supreme Court of Michigan should be affirmed with costs.

WM. T. MITCHELL,
ATTY. FOR THOS. WELLMAN,
Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

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THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY, PLAINTIFF IN ERROR.

vs.

THOMAS WELLMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF ON BEHALF OF THE STATE OF MICHIGAN.

A. A. ELLIS, *Attorney General, Att'y for the State.*

THE SUPREME COURT OF THE UNITED STATES

THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY
Plaintiff in Error.

vs.

THOMAS WELLMAN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT FOR THE STATE OF MICHIGAN.

BRIEF ON BEHALF OF THE STATE OF MICHIGAN AS TO THE CONSTITUTIONALITY OF ACT NO. 202 OF THE PUBLIC ACTS OF 1889 OF THE STATE OF MICHIGAN.

In the year 1889 the Legislature of the State of Michigan, by Public Act No. 202, amended Sec. 3323 of Howell's Statute's, being a part of the general railroad law of the State of Michigan. This amendment, so far as it affects this case, is given below.

(§ 3323.) SEC. 9. "Every such corporation shall possess the general powers and be subject to the liabilities and restrictions following, that is to say: * * *

Ninth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz: for a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads, for the year one thousand eight hundred and eighty-eight equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile, and for all companies the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid, were less than two thousand dollars per mile of road operated by said company, three cents per mile: *Provided*, That in future, whenever the earnings of any company doing business in this State, as reported to the commissioner of

THE SUPREME COURT OF THE UNITED STATES

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railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case said companies shall thereafter, upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile as hereinbefore provided: *Provided*, That roads in the Upper Peninsula, which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile. * * * *" (Public Acts 1889, pp. 282, 283.)

The gross earnings of the complainant corporation, as shown by the report of said corporation to the railroad commissioner for 1888, exceeded three thousand dollars per mile. The law took effect the 2nd day of October, 1889.

The plaintiff corporation was organized under the general railroad law of the State of Michigan in 1880.

On the same day that the law took effect, Oct. 2, 1889, the defendant in error applied to the properly authorized agent of the plaintiff in error, at their office in Port Huron, for a ticket of passage from Port Huron, Mich., to Battle Creek, Mich., a distance of $159\frac{3}{4}$ miles, and tendered therefor the sum of $3.20 in legal tender money of the United States.

The money was refused, and the agent of the company refused a ticket to the defendant in error for such sum, which refusal the defendant avers was of damage to him. He brought suit in the circuit court for the county of St. Clair. The case was tried by a jury.

The defendant in the court below—the appellant in this case—requested the circuit judge to instruct the jury as follows (Record, p. 11).

"*First.* The act under which the plaintiff brings his suit is unconstitutional, and the plaintiff cannot recover in this case, therefore your verdict will be for the defendant." Which request the Court refused to give, to which refusal defendant excepted.

The jury rendered a verdict in favor of the plaintiff, and the cause was, by the railroad company, removed to the supreme court of the State of Michigan on writ of error. In that court the only error assigned was as follows (Record, pp. 11-12):

"*First.* Because the court erred in refusing to give defendant's request to charge numbered I, which is as follows: 'The act under which the plaintiff brings his suit is unconstitutional, and the plaintiff can not recover in this case, therefore, your verdict will be for the defendant.'"

On the hearing in the supreme court of the State of Michigan the judgment was affirmed.

As stated by Judge Morse in his opinion (Record, p. 16). "It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the Attorney General, when it was brought into the supreme

court of the State of Michigan upon writ of error interposed in order to represent the public interest.

"In the stipulation of facts nor in the taking of testimony in the court below, neither the Attorney General nor any other person employed for and in behalf of the people of the State took any part."

And the question here to be decided, being of great importance to the State of Michigan, before entering upon discussions of law, I desire to call this court's attention to some matters of fact that it appears to me should be considered by this court in determining whether or not this law, passed by the Legislature of the State of Michigan, is constitutional.

It will be observed by the stipulation of facts (Record p. 6) under the seventh paragraph, that "the total earnings and income of the defendant from all sources for the year 1888 was $3,228,338 17.

"Of this amount there was received from passenger traffic the sum of	$1,065,502 94
and from freiget traffic	2,160,180 23
from miscellaneous sources	2,655 00

"*Eighth.* That the defendant's 'operating expenses' for the year

1888 were	$2,404,516 54
that the interest paid on its bonds was	661,335 36
other necessary expenses	150,305 61
	$3,216,157 51"

This of course would leave a balance of $12,257.94, which, it is stated under the ninth paragraph, was paid on account "of interest on bonds not paid in previous years."

It will be noticed from this statement that there is nothing that appears to show what the earnings were any of the preceding years, or what disposition had been made of the money; it is simply shown, as a matter of fact, that there was some interest that "had not been paid."

It will also be noticed that under the eighth paragraph above quoted that the language used is this: "That the defendant's operating expenses for the year 1888 were $2,404,516.54." "Operating expenses" is a very broad term. What does it include?

The statutes of the State of Michigan (Chapter 90 of Howell's statutes) provides for the appointment of a commissioner of railroads. (Chapter 90 of Howell's statutes is act No. 79 of the public acts of 1873.) It is provided that the Governor shall, every two years, appoint a commissioner of railroads, to hold his office for the term of two years next after his appointment.

Section 3286 of Howell's statutes (which is a part of said chapter) provides that: "No person shall be appointed as such commissioner who is not an elector of this State, and who, at the time of his appointment, is in any way connected with any railroad corporation, or who is directly or indirectly interested in any stock, bond, or other property of, or is in the employ of, any railroad corporation; and no person appointed as such commissioner shall, during the term of his office, become interested in any stock, bond, or other property of any railroad company, or in any manner be employed by or connected with any railroad corporation."

It is the duty of corporations to report, under oath, each year, their income and expenses in an itemized form. Sec. 3291 of Howell's statutes provides: "Every railroad corporation incorporated or doing business in this State, or which shall hereafter become incorated or do business under any general or special law of this State, shall, on or before the first day of May, in the year of our Lord, one thousand eight hundred and seventy-three, and on or before the same day in each and every year thereafter, make and transmit to the commissioner appointed by virtue of this act, at his office in Lansing, a full and true statement under oath, of the proper officers of said corporation, of the affairs of said corporation on the thirty-first of December preceding, specifying:

First. The amount of capital stock subscribed, and by whom;

Second. The names of the owners of its stock, the amounts owned by them respectively, and the residence of each stockholder so far as known;

Third. The amount of stock paid in, and by whom;

Fourth. The amount of its assets and liabilities;

Fifth. The names and place of residence of its officers;

Sixth. The amount of cash paid to the corporation on account of the original capital stock;

Seventh. The amount of funded debt;

Eighth. The amount of floating debt;

Ninth. The estimated value of the road bed, including iron and bridges;

Tenth. The estimated value of rolling stock;

Eleventh. The estimated value of stations, buildings and fixtures;

Twelfth. The estimated value of other property;

Thirteenth. The length of single main track;

Fourteenth. The length of double main track;

Fifteenth. The length of branches, stating whether they have single or double tracks;

Sixteenth. The aggregate length of siding, and other tracks not above enumerated;

Seventeenth. The number of miles run by passenger trains during the year preceding the making of the report;

Eighteenth. The number of miles run by freight trains during the same period, including the mileage of rented cars;

Nineteenth. The number of tons of through freights carried during the same time;

Twentieth. The number of tons of local freights carried during the same time;

Twenty-first. Its monthly earnings for the transportation of passengers during the same time;

Twenty-second. Its monthly earnings for the transportation of freight during the same time;

Twenty-third. Its monthly earnings from all other sources respectively during the same time;

Twenty-fourth. The amount of expense incurred in the running and management of passenger trains during the same time, including the amounts paid for the use of palace and sleeping cars;

Twenty-fifth. The amount of expense incurred in the running and management of freight trains during the same time; also, the amount

of expense incurred in the running and management of mixed trains during the same time;

Twenty-sixth. All other expenses incurred in the running and management of the road during the same time, including the salaries of officers, which shall be reported separately;

Twenty-seventh. The amounts expended for repairs of road and maintenance of way, including repairs and renewal of bridges and renewal of iron during the same time;

Twenty-eighth. The amounts expended for improvements, and whether the same are estimated as a part of the expenses of operating or repairing the road during the same time, and if either, which;

Twenty-ninth. The amount expended for motive power and cars during the same time;

Thirtieth. The amount expended for station houses, buildings and fixtures during the same time;

Thirty-first. All other expenses for the maintenance of way during the same time;

Thirty-second. All other expenditures during the same time, either for management of road, maintenance of way, motive power and cars, or for other purposes;

Thirty-third. The rate of fare for passengers for each month during the same time, through and way passengers separately;

Thirty-fourth. A tariff on freights and special rates, showing each change of tariff and special rates during the same time, through and way freights separately;

Thirty-fifth. A copy of each published rate of fare for passengers, and tariff of freight, in force, or issued for the government of its agents during the same time;

Thirty-sixth. Whether the rate of fare and tariff of freights in such published lists are the same as those actually received by the corporation or its agents during the same time. If not, what were received;

Thirty-seventh. What express companies run on its road, on what terms and conditions, and the kind of business done by them;

Thirty-eighth. What freight and transportation companies run on its road, and on what terms;

Thirty-ninth. Whether such freight and transportion companies use the cars of the railroad corporation or the cars furnished by themselves;

Fortieth. Whether the freight or cars of such companies are given any preference in speed or order of transportation; and if so, in what particular;

Forty-first. What running arrangements it has with other railroad corporations, setting forth the contract for the same. And the said commissioner shall cause to be made suitable blanks at the expense of the State, and forward the same to such railroad corporations, upon which to make the reports required by this act;

Forty-second. The number of acres of land sold during the year, the price received therefor, and the number of acres still owned by the company, not used for corporate purposes."

In addition to the report to be made in this section, the commissioner is given extraordinary powers for investigation.

Sec. 3292 of Howell's statutes of the State of Michigan provides:

"The said commissioner may make and propound to such railroad corporations any other or additional interrogatories relating to the management of such corporations and the condition of their respective railroads and rolling stock as in his judgment may be necessary, in order to gain full information in regard thereto, etc."

Sec. 3295 of Howell's statutes provides: "The said commissioner shall examine into the condition and management of all other matters concerning the business of railroads in this State, so far as the same affect or relate to the interests of the public * * * * * * and for such purpose said commissioner shall have a right to examine the books, papers, records and vouchers of any railroad corporation in this State, in his discretion; and he shall have power to examine under oath or affirmation, any and all directors, officers, managers, lessees, employés, or agents of any such railroad corporation, and any other persons concerning any matter relating to the condition and management of the business of such corporation."

Sec. 3296 gives him authority to issue subpœnas and provides for punishment in case of refusal to appear and testify.

Sec. 3312a, which is an amendment to this chapter added in 1881, provides: "Every railroad company doing business in this State shall report to the commissioner of railroads, on or before the 25th day of each month, its earnings from every source for the preceding calendar month, and the proper blanks for that purpose shall be furnished by the commissioner. Any willful neglect to make such report shall render the company liable to a penalty of fifty dollars for each offense."

Sec. 3294 of Howell's Statutes provides that the commissioner of railroads shall make a report to the Governor, and such report shall be, by the Governor, laid before the Legislature. Hence, the Legislature has before it an itemized statement as provided in Sec. 3291, above quoted.

At the time the Chicago & Grand Trunk railway company was organized that portion of section 3323 of Howell's statutes, bearing upon the matter at issue in this cause, read as follows:

"*Ninth.* To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred pounds, shall not, except on railroads operating less than twenty miles of road, exceed the following prices, viz.: For a distance not exceeding five miles, four cents per mile; for all other distances, not exceeding three cents per mile; and no fare shall be less than five cents, and that amount in any case may be charged and collected; and the price of tickets may, for convenience in making change, be fixed for that multiple of five which is nearest the exact amount of the fare in each case, as fixed by the foregoing rates: *Provided*, that in the upper peninsula five cents per mile may be charged and collected on all railroads."

Section 11 of article 5 of the same chapter of the general railroad law under which the company was organized contained this clause (Howell's statutes, section 3395): "This act may at any time be altered, amended, or repealed, but such alteration, amendment, or

repeal shall not affect the rights of property of companies organized under it."

When the said company was organized, among the other powers that were given it by section 3323 of Howell's statutes are the following:

Under the first subdivision, to survey for the road, "to enter upon lands or waters of any person or company, but subject to liability for all damages which they shall do thereto."

Under the third subdivision, "to purchase * * * * and take, and, by its officers, engineers, surveyors, and agents, enter upon and take possession of, hold and use all such lands and real estate, franchises and other property as may be necessary for the construction, maintenance, and accommodation of its railroad and stations, depots, and other accommodations, etc."

"*Fourth.* To lay out its road, not exceeding one hundred feet in width, etc."

"*Fifth.* To construct its road upon or across any stream of water, water-course, private road, street, lane, alley or highway, and across any plank-road, railroad or canal which the route of its road shall lie along or intersect."

"*Seventh.* To take, transport, carry, and convey persons and property on their said road, by the force and power of steam, animals, or any mechanical power, or by any combination of them, and to receive tolls and compensation therefor: *Provided*, That in transporting freight by the car loaded by the shipper, and unloaded by the consignee, no railroad company shall charge for transporting each of such cars more than eight dollars for any distance not exceeding ten miles, nor more than fifty cents per mile for the second ten miles, nor more than twenty-five cents per mile for the third ten miles; and for distances exceeding thirty miles, in no case shall the charge between any two points on the said railroad exceed the minimum charge on the entire line. This provision shall not apply to the Upper Peninsula nor to any company operating less than fifteen miles of railroad."

The other powers herein specified, quoted from Sec. 3323 of Howell's statutes and the limitation thereon, with the exception of subdivision nine, relative to pessenger rates, remain the same as they did at the time of the organization of the Chicago & Grand Trunk Railway Company.

The constitution of the State of Michigan places railroad corporations and certain other corporations organized for the purpose of performing the duties of common carriers, so far as the time for which they may be organized, on the same basis with municipal corporations.

Article 15, Sec. 10, reads as follows: "No corporation, except for municipal purposes, or for the construction of railroads, plank roads and canals, shall be created for a longer time than thirty years."

Those provisions of the constitution of the State of Michigan relative to the limitation of the powers that may be vested in corporations, and prescribing the powers of the Legislature over railroad corporations so far as they affect this case are as follows:

"Article 15, Sec. 1. Corporations may be formed under general laws, but shall not be created by special act, except for municipal

purposes. All laws passed pursuant to this section may be amended, altered or repealed." * * *

"Article 19–A. Sec. 1. The Legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad."

That part of section 1, Article 15, above quoted, was a part of the Constitution of the State of Michigan as originally adopted in 1850.

Sec. 1, Article 19–A, above quoted, is an amendment to the constitution passed by the Legislature and adopted by the people in 1870.

Third. The commissioner of railroads of the State of Michigan is required each year to make a report, as above stated. Those reports, under the laws of the State, are to be laid before the Legislature, and printed as a part of the joint documents; also a certain number of the reports are to be published for general distribution.

Sec. 3294 of Howell's statutes above quoted provides that "the commissioner of railroads shall on or before the first day of January of each year and oftener if required, make a report to the Governor of his doings for the preceding year."

These reports contain an exact copy of the reports of all railroad companies filed the preceding year. He is also to make such "explanation as will disclose the actual workings of the system of railroad transportation of freight and passengers and its bearings upon the business prosperity, personal convenience and safety of the people of the State."

Sec. 16 of Howell's statutes provides that: "There shall be published a sufficient number of copies of the reports of the several officers * * * now or hereafter required to make reports * * * and to be bound togehter as joint documents of the fiscal or calendar year for which such reports are made, to supply the following persons, officers, libraries, corporations, societies, viz: State officers and their deputies, libraries of State officers, officers and libraries of State institutions * * * the United States Senate library and the library of Congress; * * * justices of the supreme court, judges of the circuit court * * * That in addition to the foregoing there shall be published of said reports, as joint documents, three hundred and fifty copies, one hundred and fifty copies of which shall be deposited in the State library * * * etc."

The courts of the State of Michigan take judicial notice of these public records made by the officers of the State, and such has been the practice of this court,

U. S. vs. Teschmaker 22 How., 405;
Romeo vs. U. S., 1 Wall., 742;
Watkins vs. Holman, 16 Pet., 56;
Bryan vs. Forsyth, 19 How., 338;
Gregg vs. Forsyth, 24 How., 179;

and the language used in the stipulation of facts must be considered in connection with the well settled principle that the court will take judicial notice of public documents, published by authority.

In order to establish the fact that the $2,404,516.54 spoken of as "operating expenses" embrace the total expenses for this railroad during the year 1888, I quote from the report of the commissioner of railroads of Michigan for the year 1889, p. 238. The reports of railroads made in the year 1888 appears in the report of 1889 and so on through the volumes. The reports being required to be made in December, 1888, could not appear until the volume of 1889.

GENERAL EXHIBIT.

	Debit.	Credit.
Total income		$3,228,338 17
Total expenses, including taxes	$2,404,516 54	
Net income		$823,821 63
Interest on funded debt	$661,335 36	
Interest on unfunded debt	14,570 20	
Rentals leased line, etc.	56,142 55	
Rentals of cars	79,592 86	811,640 97
Balance for the year		$12,180 66

On page 248 of the same report, which is also a part of the report of the Chicago & Grand Trunk railway company for the year 1888, under the head of "Passenger traffic," it plainly appears that the rate fixed by the Legislature of the State of Michigan by act No. 202 of the public acts of 1889 is a higher rate than the average rate of fare per mile for all passengers charged by that road during the year 1888.

I quote the following, which includes the whole of the report relative to the number of passengers and the rate of passenger traffic:

Passenger Traffic.

	Number and Quantities.	Miles.	Rate. Dolls. Cents.
Number of through passengers carried	120,033		
Number of local passengers carried	610,594		
Total number of passengers carried	730,627		
Total passenger mileage, or passengers carried one mile		60,543,518	
Average distance traveled by each passenger		82.9	
Average amount received for each passenger			$1 37
Average rate of fare per mile for through passengers			01.33
Average rate of fare per mile for local passengers			02.18
Average rate of fare per mile for all passengers			01.62

Again we are not left in doubt as to whether or not the rates charged for passenger and freight traffic by the Chicago & Grand Trunk Railway Company will secure to the stockholders any dividend, as it clearly appears from the report of that company, in the year 1889, that the balance for that year was $131,229.35; while the balance in 1888 was only $12,180.66, or an increase of $119,048.69.

The said exhibit for the year 1889 of the Chicago & Grand Trunk

Railway Company (See Report of the Commissioner of Railroads of Michigan 1890, p. 111) was as follows:

GENERAL EXHIBIT.

	Debit.	Credit.
Total income		$3,732,775 42
Total expenses, including taxes	$2,804,668 79	
Net income		$928,106 63
Interest on funded debt	$659,984 47	
Interest on unfunded debt	27,439 57	
Rentals of leased lines, etc.	40,434 08	
Rentals of cars	69,019 16	
		796,877 28
Balance for the year		$131,229 35

While during the same year the average passenger rates were less than two cents per mile, and the local rates only 02.13 cents per mile. (See report of Commissioner of Railroads for 1890, p. 119, under the head of "Passenger Traffic" of the Chicago & Grand Trunk Railway Company.) I quote so much as relates to passenger traffic:

CHICAGO & GRAND TRUNK RAILWAY COMPANY.

Passenger Traffic, 1889.

	Number and quantities.	Miles.	Rate. Dollars. Cents.
Number of through passengers carried	113,949		
Number of local passengers carried	720,298		
Total number of passengers carried	834,247		
Total passenger mileage, or passengers carried one mile		59,120,053	
Average distance traveled by each passenger		70.9	
Average amount received from each passenger			$1 22
Average rate of fare per mile for through passengers			01.49
Average rate of fare per mile for local passengers			02.13
Average rate of fare per mile for all passengers			01.72

The general exhibit of the same railroad for the year 1890 (See report of the Commissioner of Railroads 1891, pp. 58 and 59) is as follows:

GENERAL EXHIBIT.

	Debit.	Credit.
Total income		$3,835,525 07
Total expenses, including taxes	$2,914,828 39	
Net income		$920,696 68
Interest on funded debt	$659,976 93	
Interest on unfunded debt	4,979 34	
Rentals of leased line, etc	22,668 07	
Rentals of engines and cars	111,124 84	798,749 18
Balance for the year		$121,947 50

This shows a balance for that year of $121,947 50, while the average rate of passenger fare on the same road during that year, for both local and through passengers, was less than two cents per mile.

See report of Commissioner of Railroads for 1891, under the head of "Passenger Traffic," page 64. I quote the same:

Passenger Traffic.

	Numbers and quantities.	Miles.	Rate.
Total number of through passengers carried	119,017		
Number of local passengers carried	861,760		
Total number of passengers carried	980,777		
Total passenger mileage, or passengers carried one mile	63,609,048		
Av. distance traveled by each passenger		64.9	
Average amount received from each passenger			$1 08.35
Average rate of fare per mile for through passengers			01.49
Average rate of fare per mile for local passengers			01.97
Average rate of fare per mile for all passengers			01.67

It will be remembered that the law relative to two cents per mile did not take effect until October 2, 1889, and that the Chicago & Grand Trunk railway company refused to reduce their rates, and that the decision by the Supreme Court of the State of Michigan, in this case in relation thereto, was not rendered until December 24, 1890. Hence, at most that report could not have contained over six days of reductions of rates, had the company reduced their rates at once, but as a matter of fact, they will not contend that they reduced them at all during that month, although that fact does not appear by the reports.

Hence it plainly appears that the rates fixed by the Legislature of the State of Michigan, which are condemned and claimed to be a confiscation of the property, are higher rates than are charged by the railroad itself, as appears by their own reports.

It was claimed that the rate if reduced would necessarily reduce the amounts received below those received in 1888. The above quotations from the reports show that claim unfounded. But go a little further. The sworn reports of the Chicago & Grand Trunk railway company on file for each month, commencing in March, 1891, at the time they adopted the two cent rate in Michigan, and evidently concluded to obey the law, compared with the amounts received each month in 1888, conclusively shows that the speculation and guess as to the result of the reduction is entirely wrong.

RECEIPTS FROM PASSENGER TRAFFIC.

Comparative Statement of Passenger Earnings, Chicago & Grand Trunk Railway Company.

		Rate 3 cents per mile in Michigan, 1888.	Rate 2 cents per mile in Michigan, 1891.
Amount received	March	$65,057 45	$74,034 01
" "	April	78,332 60	87,539 16
" "	May	102,501 48	84,445 22
" "	June	101,380 57	104,017 73
" "	July	101,754 95	111,354 31
" "	August	96,984 37	102,978 12
" "	September	95,628 83	108,535 96
	Totals	$641,640 25	$672,904 51

STATE OF MICHIGAN, } ss.
COUNTY OF INGHAM, }

I, Robert Laughlin, Deputy Commissioner of Railroads in and for the State of Michigan, do hereby certify that the foregoing is a true and compared statement of the comparative passenger earnings of the Chicago & Grand Trunk railway company for the months above mentioned for the years 1888 and 1891, as appears by the reports of the said railway company now on file in the office of the Commissioner of Railroads in and for the State of Michigan.

ROBERT LAUGHLIN,
Deputy Commissioner of Railroads.

Dated December 14th, 1891.

I have quoted thus fully from the constitution, statutes and reports of the State of Michigan for the purpose of showing:

First. That under the laws of the State of Michigan, the Legislature had before them an itemized statement of the receipts and expenditures of the Chicago & Grand Trunk Railway Company, as well as the other railroad companies in the State of Michigan, at the time they passed the act in question;

Second. That, under the Michigan statutes, ample provisions are made to protect both the rights of the railroad corporations and the people;

Third. That under the statutes of the State and reports which are necessarily furnished by the railroad companies of the State of Michigan, no necessity whatever existed for leaving the question as to the use for which money has been expended in doubt;

Fourth. That the Legislature of the State was able to know the receipts of any railroad company during any month of any year after the year 1873;

Fifth. That the words "operating expenses" included improvements made on a railroad company in 1888;

Sixth. That the appellant railroad actually pays a good dividend with the present rate;

Seventh. That, as a matter of fact, the maximum rate fixed by the statute is higher than the average rate charged to either local or

through passengers in the year 1890 prior to the enforcement of the statute of 1889, and that the maximum rate fixed by the statute is higher than the average rate charged all passengers in either of the years 1888, 1889 or 1890 under the old law;

Eighth. That the average receipts of the Chicago & Grand Trunk Railway Company since the two-cent rate in 1891 is greater for passenger traffic than under the three-cent rate in 1888.

The railroad is to report, as provided in the 28th subdivision of section 3291 above quoted, "The amount expended for *improvements* and whether the same are estimated as part of the *expenses of operating* or repairing the road during the same time, and if either, which?

It will be seen by this subdivision that under the laws of the State of Michigan that the railroad company have to report the improvements upon their line, and may classify them either as the "*expenses of operating*" or "*repairing the road*," and by their report it would appear to which account they had charged such expenses; and it clearly appears from the stipulation of facts in this case that they have, in making up their *operating expenses*, included all moneys expended in improvements.

It is a self-evident fact that the stockholders of a railroad are often benefited quite as much by extensive improvements upon its line as they are by declaring dividends; and I insist if the question should have been presented in this case to a jury as to whether the rate was a reasonable rate or not, it would also be necessary for the appellants in this case to show that they had made reasonable use of their money.

It is true that the stipulation of facts shows that it cost $2,404,516.54, as "operating expenses" of the road for the year 1888, but it is also true that, availing themselves of the above quoted statutory provision of the statutes of the State of Michigan, the appellants have placed all of the improvements of the road and caused them to be classified and described in the statement of facts as "operating expenses;" hence it is impossible to tell from the stipulated facts how much money went to building depots, purchasing new rails, ties, and general improvements of this road, and had the question been submitted to a jury they could not have said how much was spent for improvements, and nobody can attack the rate established as incorrect on the ground that it is unreasonable, nor can any person pass an intelligent judgment on that fact without knowing for what the railroad company expended the $2,404,516.54.

It will be observed that the railroad company did not ask to have the question submitted to the jury as to whether or not this statute fixed a reasonable compensation, but the railroad company asked the Court to charge the jury, as a matter of law, that this statute was unconstitutional, without assigning any reason whatever for such request.

The rate to be agreed upon or fixed by the Legislature can not be tested by admitting that the appellant's use of the money is infallible or that it was properly expended. If this is so there is not a railroad in the country but what can avoid the reduction of the rate upon its transportation, no matter how just the reduction, by simply using its

income to improve the value of its stock by building depots and extending its roads.

A railroad corporation is no different from any other corporation. The stock represents the property, and the stockholders can be made rich as well by increasing the value of the stock as by declaring dividends.

When the stipulated facts are read in the light of the Michigan law, the only question that can be passed upon by this court and do justice to the parties concerned are the abstract propositions presented to the court below.

1st. Has the Legislature of the State of Michigan authority, under and by virtue of the constituton and statutes of that state, to fix a maximum of charges or to decrease the rate to be charged for the transportation of passengers upon any railroad organized under the general railroad statutes of said State? and

2d. Is the regulation adopted in this case a uniform one, and such as should be sustained by the Court?

I

Assignment of error No. 1 alleges that act No. 202 of the session laws of Michigan of 1889, "is repugnant to Sec. 10 of article I of the constitution of the United States and void."

This claim is presumably made on the theory that the states are forbidden to make any "law impairing the obligation of contracts."

The first reply to this claim is found in the language of Chief Justice Waite in the case of Stone vs. Farmers' Loan & Trust Company, 116 U. S. 325.

"It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or inter-state commerce."

It is further said in the same case that "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power."

At the time the defendant corporation was organized, the statute under which their charter was granted gave them authority "to regulate the time and manner in which passengers and freight should be transported, and the tolls and compensation to be paid therefor," subject to certain restrictions named in the same section, Howell's statutes Sec. 3323, subdivision 9, above quoted.

The same act reserved to the people of the State of Michigan the power "at any time to alter, amend or repeal said act," Sec. 3395 of Howell's statutes, above quoted.

Both of those sections last referred to must be read in the light of the constitution of the State of Michigan, because the Legislature of the State of Michigan had no power to grant or give away any powers of government which are expressly reserved to each succeeding Legislature in the constitution of the State.

Article 19–A, which was in force in the State of Michigan for three years prior to the passage of the act under which the Chicago & Grand Trunk Railway Co. was organized, specifically reserved to the Legislature this power. "The Legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State."

Hence, it is not to be inferred that the Legislature when they passed the act, under which the defendant corporation was organized, intended thereby, even had they had the power, to delegate to the said corporation any continuing power to fix and control their rates. In other words, the charter in this case must be read as though the railroad corporation had stipulated within the very charter that "the Legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on all railways built or controlled by this company."

In the case of Stone vs. Farmers' Loan & Trust Company 116 U. S., 329, the clause contained in the law under which the Farmers' Loan & Trust Company was organized, is stated to be as follows: "That it shall be lawful for the company * * * from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation."

The language above quoted is not very unlike that found in subdivision 9 of Sec. 3323 of Howell's statutes, above quoted. But this difference exists between the circumstances in that case and the circumstances of this case. The constitution of the State of Michigan expressly reserves to each succeeding Legislature the right to establish maximum rates for any railroad in the State, while that power was not contained in the constitution of Mississippi.

It was held in the case of Stone vs. Farmers' Loan & Trust Company that the language above quoted did not divest the State of the right to fix reasonable maximum rates, and in this case, when the clause in that statute is read together with the right "to change, alter or amend," and the constitutional provision of the State of Michigan expressly reserving that right, there can be no question but what the people of the State of Michigan reserve to themselves the right to change the maximum rates from time to time as the Legislature may deem best.

The Legislature not having the power to divest the people of this right, it is not to be presumed that they intended to; and the power to change and regulate being contained in the act itself, and in the constitution, it must be conclusively presumed that the corporation was formed knowing the law, and with the express understanding that the maximum rates might be changed from time to time.

The following well considered cases are in harmony with the doctrine held in Stone vs. Loan and Trust Company.

Railroad Co. vs. Maryland 21 Wallace, 456;
Chicago, Burlington & Quincy Railway Co. vs. Iowa 94 U. S., 155;
Peik vs. Chicago & Northwestern Railway Co., 94, U. S., 164;
Winona & St. Peter Railroad Co. vs. Blake 94, U. S., 180;
Ruggles vs. Illinois, 108 U. S. 526, 531.

I therefore conclude that under the circumstances act No. 202 of the session laws of 1889 of the State of Michigan is not repugnant to

section 10 of article one of the constitution as impairing the obligation of contracts, unlesss exercised in a manner not authorized by the constitution and laws of the State of Michigan at the time the charter was granted to the C. & G. T. R. R. Co.

II.

Has the power of changing the rate been exercised by the tribunal agreed upon?

The power reserved in Sec. 3395 of Howell's Statutes, to-wit: "This Act may at any time be altered, amended or repealed," is a power reserved especially to the Legislature, and not to the courts.

In the original act, the maximum passenger rates are fixed, and the right to amend or alter necessarily carries with it the right to amend or alter such rates, as they are a part of the act itself. In other words, the corporation in this case contracted with the State that the Legislature should have a right to amend and alter its rates of transportation from time to time, while in the constitution of the State the power to fix maximum rates is vested absolutely in the Legislature:

"The Legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State."

I do not contend that this gives any authority to establish anything but reasonable rates, but I do contend that it is as competent for the people of the state or the nation to delegate to the Legislature the right to determine what is reasonable as it is to give that power to the courts; and when in a constitution the power is especially delegated by the people to its Legislature to perform any duty or pass upon any question and a charter is granted with that understanding, it is not competent for that duty to be performed by another branch of the government, and if the chartered rights were otherwise interfered with it would be a violation of contract.

The powers of government in Sec. 1 of Article 3 of the Constitution of the State of Michigan are divided into three departments: "Legislative, executive, and judicial."

Sec. 2 of the same article provides: "No person belonging to one department shall exercise the powers properly belonging to another, except in cases expressly provided in this constitution."

Supposing the Legislature of the State of Michigan instead of fixing the reasonable maximum rates themselves, had delegated or attempted to delegate that power to a commission, the railroad commissioner to fix it, would not the railroad company have said and would not this court be compelled to hold, under the constitution of the State of Michigan, that the railroad corporation having taken its charter under the express understanding that the right to fix the rates should be vested in the Legislature, that the Legislature themselves should exercise that power and not delegate it to some other power or some other tribunal? They certainly would. No court could hold that where a corporation had accepted a charter with the understanding that they should have the strong arm of the Legislature about them to protect their rights, and that the rates should not be changed only as the Legislature saw fit to change them, the Legis-

lature consisting of men from all sections of the country, knowing the wants of the people, it never could be held that they should afterwards submit to the opinions of one, two, or a dozen men as to what the rates should be.

At the time the Chicago & Grand Trunk Railway Company was organized, Article 19–A of the Constitution of the State of Michigan was in full force. Hence, as already stated, they were organized with a full knowledge of its provisions. Can they now be heard to say that they shall not be bound by it? A further reason why the power therein contained must be exercised by the Legislature and not the courts, is that the rate must be the *maximum rate.* The courts have authority to pass upon the reasonableness of the rates, but the power to fix the maximum rates is a legislative function and not judicial.

The same clause of the Constitution further provides that they may be adjusted "from time to time" by the Legislature, the only limitation upon this power being that it shall be reasonable.

2d. It is contended that because the constitution of the State of Michigan in Article 19–A., Sec. 1, uses the words "reasonable maximum rates" that those words necessarily refer to the judicial department of the government. In reply to that I would say that the language expressly provides that the Legislature should fix the rates. It does not provide that they shall delegate that power to some other body, and, as is said by Judge Cahill, in his opinion in this case (Record p. 35), "The use of the word 'reasonable' may as well be regarded as an admonition to the Legislature as to the courts, and it cannot he assumed that the admonition of the constitution will be more sacredly regarded by one branch of the government than another. It seems to be considered by those who argue against legislative control that to concede the power to regulate carries with it the power to destroy. As a question of abstract power this may be true, but it is not truer of legislative than of judicial control. Concede the power and its abuse is possible."

Judge Cahill quotes approvingly the following language used by Justice Graves in the case of the People vs. Salem, 20 Mich., 503, which seems to me is very applicable in this case:

"All power is subject to abuse, and if this circumstance is to be taken as an argument against its existence, we are irresistibly driven to results fatal to all government * * * * All human agencies are fallible, and the wisdom of man has never been able and never will be able to devise a system of government incapable of abuse. Every department may exceed its authority or pervert its powers. The judiciary has no pre-eminent claim to infallibility."

But this very question has been before this Court and has been decided in the case of Munn vs. Illinois, 94 U. S., 133, 134. Justice Waite, delivering the opinion of this court, uses this language: "It is insisted, however that the owner of property is entitled to reasonable compensation for its use, even though it be clothed with public interest; and that what is reasonable is a judicial not a legislative question."

"As has already been shown the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the Legislature to declare what shall be a reasonable compensation under such circumstances, or perhaps more

properly speaking, to fix a maximum, beyond which any charge made would be unreasonable. * * * * The controlling fact is the power to regulate at all. If that exists the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact the common law rule which requires the charge to be reasonable is itself a regulation as to price * * * *. A person has no property or vested interest in any rule of the common law. That is only one of the forms of municipal law and is no more sacred than any other. * * * * To limit the right of charges for services rendered in a public employment, or for the use of property in which the public has an intarest, is only changing a regulation which existed before. It establishes no new principle of the law, but only gives a new effect to an old one."

"We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts."

3d. Some stress is laid by the plaintiff in error on the case of the Chicago &c. R. R. Co. vs. Minn., 134 U. S. 418, and it is claimed that the court there, while not expressing it in words, manifested an inclination to overrule the long established doctrine held by this court, and to indicate that the right to fix rates, and to determine as to whether they were reasonable or not must be vested in the court, not in the Legislature.

From a careful reading of the opinions in that case, as pronounced by Justice Blatchford, I am unable to find that this court, in any manner changed or attempted to change any former holding that it had made relative to the rights of the several States to control and regulate the rates to be charged by railroad corporations where they were organized under the laws of the State, and the right to thus regulate was expressley reserved in the constitution and laws of the State. It was claimed in that case that because the Chicago &c. R. R. Co. was organized by the consolidation of several other corporations, one of which had particluar rights under an old charter, that the State had thereby given to the corporation the exclusive right to fix its rates. But affirming the doctrine laid down in the case of Stone vs. Farmers' Loan & Trust Company, 116 U. S. 307, this court said, referring to the last case, "The whole subject is fully considered and authorities are cited, and the conclusion is arrived at that 'the right of a state to reasonably limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction can not be granted away by its legislature, unless by words of positive grant, or words equivalent in law.'"

And after quoting further from the 116 U. S. the court used this language: "There being, therefore, no contract or chartered right in the railroad company which can prevent the Legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid."

In the Minn. case the only question passed upon was this, that inasmuch as the Legislature had delegated that power to a commission to fix the rates, and the railroad company having demanded the right of a hearing before the commission, and having been denied, this court held that they were entitled to such hearing, and if the

law contemplated that no hearing should be had then it was unconstitutional.

Speaking of the act in that case the court said: "Under Sec. 8 of the statutes * * * * all the commission is required to do is, on the filing with it by the railroad company, of the copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission shall declare to be equal and reasonable. * * * * * No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declare what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

The commission was formed after the manner of the court and no way provided by which the persons interested could be heard; not only that, but the right having been *asked* was denied. In the case at bar, the rates were fixed by the tribunal who were authorized by the constitution of the State of Michigan to change and fix the rates. At the time this corporation was formed, it took its charter knowing and understanding that the people of the State of Michigan reserved the right to the Legislature to change and fix those rates by legislative enactment from time to time, and if this corporation is entitled to its charter and to exereise the rights of a corporation, then the people of the State of Michigan have a right to insist upon the conditions under which that charter was given.

The constitution of Minnesota contemplates that the power to fix those rates should be delegated to some commission. The constitution of the State of Michigan plainly provides that that power shall vest in the Legislature; and it would seem to me, where that power is given and delegated to a branch of the government like the Legislature, organized as it is so that any person who is interested in any legislation can be heard before such legislation is passed, and under a constitution like the one in Michigan where no bill can be introduced after the first fifty days of the session, where ample opportunity is given to railroad corporations and every other corporation, to be heard, it can hardly be said that they have not had a fair and full hearing as to the rates that should be charged in every case. But even were that so, inasmuch as their charter is made subject to the powers given to the Legislature in the constitution of the State, they having consented to it, and accepted their charter understanding that to be the law, there being no claim of bad faith or fraud they ought not now to be heard to say that some other way would have secured to them higher rates of transportation.

They have built their railroad knowing what the agreement was, and instead of being as in the Minnesota case a claim that there was some contract on the part of the State by which they should have a right to fix their own rates, it expressly appears in this case, too plain for any contradiction, that the corporation itself contracted at the time it took its charter, that the Legislature of the State should, from time to time, have the right to fix reasonable maximum rates of transportation.

Hence, I say not only does not the case of the Chicago &c. R. R.

Co. vs. Minn. have any bearing in a case like the one at bar, but it seems to me that, holding as it does, that the rights reserved can be exercised in a legal way, that they must be exercised in the manner pointed out in the Constitution itself.

If the Legislature has, under any circumstances, authority to fix a reasonable maximum rate, that power is conferred in this case.

The question raised by the Chicago & Grand Trunk Railway Company in this case, as to the right of the Legislature to fix the maximum rate has been settled by this Court and sustained by a long series of opinions:

Munn vs. Illinois, 94 U. S., 113;
C. B. & Q. R. R. Co. vs. Iowa, 94 U. S., 155;
Peik vs. C. & N. W. R. R. Co., 94 U. S., 164;
C. M. & St. P. R. R. Co. vs. Ackley, 94 U. S., 179;
Ruggles vs. Illinois, 108 U. S., 526;
Stone vs. F. L. & T. Co., 116 U. S., 307.
Dow vs. Beidelman, 125 U. S. 680;
Georgia R. R. Co. vs. Smith, 128 U. S., 174.

III.

It is said that the power should not only be exercised by the body designated but in the manner indicated: That the language used in the constitution is "reasonable maximum rates," and it is contended in this case that the rates are not reasonable. Our answer to that claim is.

1st. That the question as to whether or not a court might find the rate in this case reasonable, is not submitted by this record.

The court was not asked to submit to the jury that question: This case having been tried by a jury, if it was a question for the judicial department of the government to settle, that question should have been submitted to them.

It is a well settled principle, under the laws of the State of Michigan, that one who appeals from the circuit court to the supreme court must rely upon the same objection he made in the circuit court, and that if the objection made in the circuit court was not a good one the case can not be reversed by resorting to some new point.

Hollister vs. Brown 19 Mich., 166;
Ives vs. Leonard 50 Mich., 296.

This court is only called upon to review the action of the supreme court of the State of Michigan, and the point above referred to, alone is sufficient to answer the claim made by the appellants that the rate established in this case is unreasonable.

The same principle has been suggested by this court.

Sugg vs. Thornton, 132 U. S., 524.

Their claim in the circuit court was that this act was wholly unconstitutional, because the Legislature of the State of Michigan had no right to fix "reasonable maximum rates" which should affect any railroad company organized under the general railroad law of the State of Michigan, or to change these rates after the company had been organized; and they can not be heard to contend here that the act, so far as they are concerned, is unconstitutional, because, under the circumstances of their case, the rates were not reasonable.

In the supreme court of Michigan the abstract right of the legisla-

ture to fix a maximum rate was attacked. (See record page 16 paragraph 32.) The contention now is an entire shifting of their claim since they tried the case in circuit court. It is a claim by which the law will be constitutional or unconstitutional according to the circumstances and receipts of each particular railroad company. And had that been the position they took in the court below, they would have asked the circuit judge to charge the jury that, if they found from the facts and circumstances of this case, that the rate established by the Legislature was an unreasonable rate, then they should render a verdict for the defendant.

To now claim that this law is unconstitutional because the rate established is unreasonable is to ask a reversal upon an entirely different theory than the one submitted to the circuit court, upon which the said cause was originally tried, and it raises a question which, under the rules and practices of the Supreme Court of the State of Michigan, could not have been passed upon by the Supreme Court of that State.

In the concurring opinion of Justice Miller in the case of Chicago, &c., R'y Co. vs. Minn. 134 U. S., 460 in the 5th, 6th, and 7th paragraphs of the opinion, the rule here contended for is very tersely and plainly stated. After holding that neither the Legislature nor a commission "can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation which is so unreasonable as to practically destroy the value of property * * * *" and that in such case the party aggrieved has an ultimate remedy in the courts, he said:

"5. But until the judiciary has been appealed to to declare the regulations made, whether by the Legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

"6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

2d. Not only does this record not show that the rates were unreasonable, but, as a matter of fact, they do show that a very large amount of money was received in proportion to the amount of money invested, something over 16 per cent., but it must be remembered that all of the unreasonableness that is claimed is established upon the admissions of one citizen of the State of Michigan, to-wit: the admission of Thomas Wellman; and it is claimed that a law that affects the interests of all the people of the State of Michigan shall be held unconstitutional, and a constitution which was supposed to

reserve to the people certain rights must be declared illegal, simply upon the admission of one citizen.

It seems to me that the court should hesitate a long time before determining that not only the statutes of the State of Michigan but the constitution of the State of Michigan itself is opposed to a federal constitution, when it must base this finding upon the admission of one individual, a private citizen of that State.

The course pursued by the Chicago & G. T. R. R. Co. in this case, viz: a contest with a private citizen about a matter that affects the interests of all the people of a great commonwealth and thousands of corporations therein, is the course and policy that was condemned by Justice Miller in his opinion above quoted.

3d. The reasoning of Justice Brewer in the case of the Chicago & Northwestern Railway Company vs. Dey et al., 35 Federal Reporter, 866, has no application to this case. The reasoning of that case must be considered as applied to the facts therein stated. That was a motion for preliminary injunction, as appears from the statement of facts, pp. 867, 868. It was charged in the bill of complaint that "the rates as fixed are not reasonable rates, but they are unjust and unreasonable, and so low that if enforced the complainant will not be able to earn sufficient to pay its operating expenses, fixed charges, and have a surplus left to pay dividends on the stock; and that the result will be to render many if not all of the railroads of Iowa insolvent.

"No pleadings were filed at such hearing by the defendant further than a written protest against the jurisdiction of the court to hear and determine the controversy in question." It must therefore be taken as true that the rate was "unjust and unreasonable and so low that the result would be to render many if not all of the railroads of Iowa insolvent."

It will be noticed in that case it was claimed that it would affect the complainant and also other railroads of the state. Under the well established rule that where allegations are made in a bill, and they are not denied on the preliminary hearing, they are to be taken as true.

There is also another important difference. In this case, the Legislature under and by virtue of the statutes and the constitution of the State of Michigan, fixed a rate themselves; in the case of the Chicago & Northwestern Railway Company vs. Dey, that power was delegated to the railroad commissioners, who certainly were acting as a tribunal to adjust and fix the rates.

There is necessarily a marked difference between the cases where the power to fix rates is exercised by the Legislature itself and a case where that power is delegated to some tribunal or board to perform that duty. But the facts of that case have no application to this case. In this case, it appears plainly that the rate fixed in the year 1888 left a surplus of over $12,000; in the year 1889, a surplus of $131,000; in the year 1890, a surplus of $121,000.

In that case it was virtually admitted by the course taken on the hearing that the rate was so low that it would not only bankrupt the C. & N. W. R'y Co., but "render many if not all of the railroads of Iowa insolvent."

In this case it not only appears that the rate fixed is higher than

the average rate charged by the appellant company itself, but it also appears that the question as to the reasonableness or unreasonableness of the rate was not left to the jury or such a thing even hinted at in any intelligent way.

IV.

It is next alleged that act No. 202, of the public acts of 1889 is repugnant to article XIV of the amendments to the constitution of the United States and void. "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

If I am right in my contention" that the power of the Legislature to regulate the rates was a matter of contract or a condition on which the railroad company accepted its charter and that the manner of its exercise was reasonable so far as it appears by this record or if the question of reasonableness was not raised in the circuit court as I contend, then I fail to see how on this record the question of taking property without due procoss of law can be raised—and I assume that under the constitution and statutes of the State of Michigan the Legislature has a right to establish reasonable maximum rates for the different railroads in that State.

At the time the corporation now contesting the rates was organized the rate was fixed by law and it must be presumed that both the State and the corporation understood that the right to fix the maximum rates would be exercised in the future as it had been in the past, viz: by acts of the Legislature fixing definitely the maximum limit and the corporation having consented to this cannot complain of the method used as not a due process of law.

The company has not taken any action against the State or commenced any proceeding anywhere to show fraud, mistake or bad faith on the part of the Legislature.

This record does not show either that the rate is unreasonable or that the railroad company attempted to attack the rate on that ground in the circuit court, hence there is no basis in this case for a holding that the act in question violates the clause in the XIV amendment to the constitution as depriving the appellant of its property without due process of law.

A case very similar in some respects to the one at bar is that of Dow vs. Beidelman, 125 U. S., 680. A statute of Arkansas fixes the maximum rate "on lines of railroad fifteen miles or less in length, eight cents per mile. On lines over fifteen miles in length and less than seventy-five miles in length, five cents. On lines over seventy-five miles in length, three cents per mile." The law authorized any person who was charged more than the statutory rate to bring an action against the railroad company, and the railroad company "shall forfeit or pay for such offense any sum not less than fifty dollars nor more than three hundred dollars, and costs of suit, including a reasonable attorney's fee."

Beidelman brought suit against the trustees of the Arkansas railroad, a railroad more than seventy-five miles in length, which had charged him five cents per mile instead of three as fixed by the stat-

ute. The suit was evidently collusive. The facts were agreed upon and from the agreement it appears that the receipts of the railroad, under the schedule fixed by the State, would pay less than one-half per cent on the cost of the road and only a little over two per cent on its bonded indebtedness, while its bonds bore interest at the rate of eight per cent.

The lower court was asked (unlike the proceedings in this case) to declare the act void "because under the guise of regulating charges for the carriage of passengers on railroads, it amounts virtually to the confiscation of the property of the railroad in the hands of the said defendants, and is an unreasonable, unjust, and oppressive taking of private property for public uses without compensation in violation of the Constitution of the State of Arkansas and that of the United States;" and also "because it is special legislation and makes arbitrary discrimination between the different railroads, not based either upon their value, their earnings, or other valid grounds, but based simply on the respective lengths of the several railroads."

The case was tried by the court without a jury, and a judgment for fifty dollars, with an attorney fee for twenty-five dollars, was rendered. The case was affirmed by the Supreme Court of the State. A writ of error was sued out to this court. The error assigned was that the act deprived the defendant of property without due process of law and denied to them the equal protection of the laws. The opinion was delivered by Mr. Justice Gray and concurred in by all the judges.

The language used by the chief justice in Munn vs. Illinois that "it is within the power of the Legislature to declare what shall be reasonable compensation for such services, or perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable" was cited and approved.

The C., B. & Q. R. R. case was also referred to with approval. Mr. Justice Gray said: "The same rule was affirmed and acted on in several other cases decided at the same time, in the first of which the chief justice, in answering 'the claim that the courts must decide what is reasonable, and not the Legislature,' said: 'Where property has been clothed with a public interest, the Legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts as well as the people. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change.'" And in the same connection all of the cases previously decided and referred to in this brief were referred to with approval.

The case of Dow vs. Beidelman was concurred in by the unanimous approval of the court, and was decided in April, 1888.

The same question was again before this court in the October term of the same year in the case of the Georgia R. R. & Banking Co. vs. Smith, 128 U. S., 174, and after citing with approval the cases of Stone vs. F. L. & T. Co. and Dow vs. Beidelman, Mr. Justice Field in delivering the opinion of the Court said: "The grant to it (the company) of special privileges to carry out the object of its incorporation, particularly the authority to exercise the State's right of eminent domain that it may appropriate needed property—a right which can be exercised only for public purposes; and the obligation, assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates, affects

the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. * * * * * * This is not a new doctrine but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, and better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in Munn vs. Illinois. * * * * * but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression. In almost every case which has been before this court, where the power of the State to regulate the rates of charges of railroad companies for the transportation of persons and freight within its jurisdiction has been under consideration, the question discussed has not been the original power of the State over the subject, but whether that power has not been, by stipulations of the charter, or other legislation, amounting to a contract, surrendered to the company, or been in some manner qualified. It is only upon the latter point that there have been differences of opinion."

That case was also decided by the unanimous vote of the court.

We therefore have the opinion as late as October 1888 that the power fixing maximum charges belongs to the Legislature not to the judiciary.

Now it is asserted that all of these decisions solemnly made after the careful consideration of this court, and after the various states and railroads have acted upon such decisions, that they have been overruled by this court in the case of the C. M. & St. P. R. R. Co. vs. Minn. 134 U. S. It is not asserted that this is done directly or by express terms, but it is said that that case indicates that this court has changed its mind. That case directly affirms the 116 U. S., which in turn affirmed the other previously decided.

The simple fact is that the question before the court in the case of the Chicago &c. R. R. Co. vs. Minn. did not in the least raise the question as to the right of the Legislature itself to fix the maximum rates to be charged by the railroad; but, as already said, the question there contested was the right of the Legislature to delegate that power to a commission and that commission to exercise legislative control, without giving the parties interested their day in court. And in that case, unlike the case at bar, the railroad company asked to be heard upon the question as to whether or not the rates were reasonable, while in this case the only question that was submitted to the circuit court and the supreme court of the State of Michigan was that the Legislature of the State of Michigan had no authority whatever, under any circumstances, to fix the maximum rates to be charged by railroads.

Mr. Justice Blatchford in that case says in concluding his remarks: "In view of the opinion delivered by that court (referring to the supreme court of Minnesota) it may be impossible for any further proceedings to be taken other than to dismiss the proceedings for a mandamus, if the court should adhere to its opinion that, under the

statute, it can not investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review."

The statute in that case required that the rate should be reasonable. As it was left to a commission, acting more in the nature of a court than any other body, it became a question of fact to be decided upon the evidence in the case.

The difference between the State and Federal court was not upon the power of the Legislature to fix the maximum rates and charges, but on the question as to whether the railroad company, under the facts of that case, were not entitled to a hearing before the commission as to the reasonableness of the rates, a question that cannot arise in this case for the reasons already stated.

V.

It is further contended that the act fixing the maximum rate is in violation of said article XIV of the amendments to the constitution of the United States because it makes a difference between the rates that may be charged for carrying passengers over railroads in the two peninsulas of the State, and that the classification is based on the gross passenger earnings of the road, and not on the cost of the road or the money invested, and it is contended that such divisions are a violation of the clause that "no state shall deny to any person within its jurisdiction equal protection of the laws."

There is no law that limits the Legislature as to the classes that they shall make, and they have made two:

First. As to locality;

Second. As to gross passenger earnings.

Every corporation in the same locality is treated alike and has equal protection of the laws.

At the time the Chicago & Grand Trunk Railway Company was organized the law then made the same division relatively as to rates. Railroads in the upper peninsula were then allowed to charge a higher rate than those in the southern peninsula. In fact our laws have always recognized the great difference that exists between the facilities to construct railroads in the two peninsulas.

The line between the upper and lower peninsula of Michigan is not a mere imaginary line, so to speak, but it is well marked and a natural division.

Any corporation that desires may build a railroad in either peninsula and every corporation in the same peninsula is treated alike.

The classification as to earnings is a very equitable one. Let every man pay as he has prospered. The amount invested under like circumstances is very liable to retain about the same dividend. If the rate was based on the amount invested in the road, and the company required to lower its rate as the amount invested increased, if the company was successful and put its money in first-class coaches in order to give the public good service, they would find themselves in the position that the better service they gave the cheaper they must carry, while others who gave poorer service might charge higher rates; while, on the other hand, if the road cost a large amount and

the receipts were small, they must still charge smaller rates than less costly roads whose income was much larger.

The rate, as far as the second division is concerned, is based on the same principle as a graduated income tax. No one ever doubted the *equity* of such a division as to taxes, and the principle works equity among the different roads when applied to the rates to be charged.

A law classifying railroads according to their income for the purposes of taxation was held constitutional in

Railroad vs. Gibbs, 27 S. C. 49.

Same rule as to classifying business held good in

Manufacturing Company vs. Wright, 33 Fed. Rep. 121.
See also State vs. Insurance Company, 40 La. 463.
Walcott vs. People, 17 Mich. 68.
Kentucky R. R. Tax Cases, 115 U. S. 321.

The court should take judicial notice of such geographical divisions as exist between the two peninsulas of Michigan, and that the cost of construction in the upper peninsula is far greater than in the lower peninsula. The distinction was recognized years ago, and has existed for over seventeen years in our railroad law.

But I contend that the clause above referred to does not prohibit the Legislature of the State of Michigan from making such division or classification as they see fit, so long as they treat all persons of the same class, under the same circumstances, alike. The clause referred to was placed in the amendment to the Constitution with entirely a different object in view.

Slaughter-House Cases, 16 Wall 36.
Strauder vs. West Virginia, 100 U. S. 31.

It is not meant that all persons in every part of a state shall be governed by the same law. The meaning of the fourteenth amendment is aptly stated and illustrated in the case of

Missouri vs. Lewis, 101 U. S. 31.

The court said: "If the State of New York, for example, should see fit to adopt the civil law and its methods of procedure in New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded an equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes *in the same place* and *under like circumstances*. * * * If diversity of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversity in different parts of the same State. A uniformity which is not essential as regards different

States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitution."

The following cases also hold the same doctrine:

Railroad Company vs. Richmond, 96 U. S., 529—text.
Hayes vs. Missouri, 120 U. S. 71–72.
Crowley vs. Christensen, 137 U. S. 86.
Kentucky Railroad Tax Cases, 115 U. S. 321.
Barbier vs. Connolly, 113 U. S. 32—text.

I respectfully refer this Court to the opinions of the justices of the supreme court of the State of Michigan, found in the record, for a history of the railroad legislation of the State of Michigan.

And I ask on behalf of the people of the State of Michigan, who have a great interest in this case, and who desire to see the constitution and laws upheld, that the judgment of the supreme court of the State of Michigan be affirmed.

A. A. ELLIS, *Attorney General,*
Attorney on behalf of the State.

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JAMES H. McKE
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IN THE

Supreme Court of the United States.

THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY,
Plaintiff in Error,
vs.
THOMAS WELLMAN.

Term No. 1031.

SUGGESTIONS IN REPLY TO SOME MATTERS STATED IN THE BRIEF OF THE ATTORNEY GENERAL OF MICHIGAN.

E. W. MEDDAUGH,
Of Counsel for Plaintiff in Error.

Press of McGill & Wallace, Washington, D. C.

IN THE

Supreme Court of the United States.

THE CHICAGO AND GRAND TRUNK RAILWAY COMPANY, Plaintiff in Error,

vs.

THOMAS WELLMAN.

Term No. 1031.

Suggestions in Reply to Some Matters Stated in the Brief of the Attorney General of Michigan.

I.

On page 13 of the brief it is said "it clearly appears from the stipulation of facts in this case that they have, in making up the operating expenses, included all moneys expended in improvements."

It is not quite apparent to me where or how this so clearly appears, which is contrary to the fact. The only pretense for excuse for the bold statement of the Attorney General seems to be the provision of the statute respecting the reports from the railroad companies to the Railroad Commissioner, which requires that reports shall show whether improvements are estimated as part of the operating expenses. But the logical connection here is not plain. The point seems to be this:

The law required this railway company to report to

the Railroad Commissioner the amount expended for improvements, and whether the same are estimated as part of the expense of operating.

In the stipulation of facts in the case it appears that the operating expenses for 1888 amounted to	$2,404,516.54
Interest on bonds, etc., was	661,335.36
Other necessary expenses, etc	150,305.61
Interest passed in previous years on bonds.	12,257.95
Making a total of	$3,228.415.45
Out of the aggregate gross receipts of the company of the year of	$3,228,338.17

It is no doubt permissible under the law to include money expended for improvements as part of the expenses incurred in operating or repairing the road; but I confidently submit that the phrase "operating expenses" as used in the stipulation of facts in this case could not fairly be construed to include improvements. Such is not the ordinary and usual meaning of the term. It carries no idea of money expended for betterments. The jury could and would have found a verdict, had the facts been submitted, on the truthful hypothesis that no improvements were included.

The State's attorney seems in his brief (page 15) to affirm it as a fact that the amount named as operating expenses embraced money laid out in improvements. Against this I wish to put my denial. A reference to the Railroad Commissioner's report for the year 1889 (pages 241–2–3) will settle the fact.

II.

A criticism is also made of the statement in the stipulation of facts that the remainder of the earnings for the year 1888, after paying operating expenses and the interest of that year on the bond debt, "was paid on ac-

count of interest on bonds not paid in previous years." It is suggested that the earnings of previous years may have been equal to the payment of current interest, but were misapplied. In other words, that the directors, who are merely trustees, violated their duty and in effect paid a dividend by adding to the value of the property; and this in face of the further statement in the agreed facts that the sum of the company's unfunded debt, amounting to about $900,000, was, in part, made up of "bond interest not *earned* or paid in previous years."

The Railroad Commissioner's reports for these previous years were available for the purpose.

But, if so, it might have been shown on the part of the plaintiff.

The Attorney General speaks of the case as evidently a friendly case, and Justice Morse, in his opinion, also so speaks of it. This may be conceded, but what of it? There is no ground for the claim that any fraud or trickery has been practiced in presenting the testimony. The Michigan court treated the case seriously, and passed upon the validity of the law.

When the case reached the Supreme Court of the State the Attorney General was, at the request of the counsel for the railway company, invited to appear and participate in the argument. He came into the case on our invitation therefore, and not of his own motion.

III.

The State's attorney seems to think we committed a fault, or had some bad motive, in not showing the trial court what the earnings of this corporation were for the years previous to 1888. He should know better than to make this criticism. It is fair to presume, since he has manifested so much industry in examining the reports of the company for subsequent years, that he has also examined them for years previous. Why has he not put

into his brief, for the enlightenment of this court, just what the facts respecting the earnings and expenses of the company were for these previous years? This is still open to him, and we invite the fullest inquiry on this point by him or by this court.

We limited the showing to the year 1888 only because the Legislature had made the earnings for that year the basis for fixing the future passenger rates. On that basis the rate fixed seemed to us ruinously unreasonable, as it still does.

IV.

He says we have shifted our ground of attack from that taken in the trial court; that we there claimed simply that the law was unconstitutional, and he makes the implication, if he does not so state in specific terms, that we did not seek to show the rate fixed was unreasonable.

If he is correct in this, what materiality or relevancy was there in the facts we put in evidence by the stipulation and the oral testimony?

But, as we have said in the printed brief on this point, the question of practice in the trial court is not open here. We put in evidence indisputable facts, facts that can not be controverted, nor their force as evidence weakened by any other fact not in the case, tending to show the rate prescribed to be unreasonable. This evidence would have sustained a verdict that the rate was unreasonable. The evidence was not submitted to the jury. The Supreme Court of the State, in its judgment, has held that the question of the reasonableness of the rate was not for the court—is not a judicial question under the constitution and laws of Michigan. It is this judgment of the Supreme Court that is here for review. That court, which might have taken the point here made by the Attorney General, has waived it, as it had a clear right to do. The point is not open here.

V.

He has introduced into his brief a quantity of figures from the Railroad Commissioner's reports for 1889 and 1890, apparently under the impression that the evidence in the cause as to the reasonableness of the legislative rate of fare was not closed in the trial court *quoad* the case here. He may be right in this view, but, if so, the practice is a novel one to me. If, in the opinion of the court, this method of procedure is legitimate, I do not desire to avoid the issue, and am quite prepared to meet this new testimony and to show that it utterly fails to sustain the contention of the State's attorney.

These figures show an increase in the gross and net earnings of the company for the years 1889 and 1890 over those of the year 1888, and they also show that more money was received from passenger business in each of the years of 1889 and 1890 than in the year 1888.

The inference of the State's attorney from this seems to be that, instead of being harmed by the reduced passenger rate, the reduction has proved a blessing to this railway company.

Now, it will be observed, that the total number of through passengers carried by the company for the year 1888 was	120,033
while the total number carried in 1889 was...	113,949
Being ..... less than in the previous year.	6,084
The total number of local passengers carried in 1888 was.....	610,594
while for 1889 the number carried was.....	720,298
Being..... more than the number carried in 1888.	109,704

The total number of through passengers carried in 1890 was 119,017
or 1,016 less than the number carried in 1888, while the number of local passengers carried in 1890 was..... 861,760
or 251,166 more than were carried in 1888.

It is apparent from all this that whatever gross revenue was realized from the passenger traffic of 1889 and 1890 over that realized in 1888 must have come from the so-called local passengers. This means passengers whose transportation begins and ends on the company's lines of road, and without extending the whole length of the road.

The explanation of the increase in number of local passengers carried and of the gross earnings from passenger traffic is very simple.

In the first place, for seven and one-half months of the year 1890, to wit, from May 15, 1890, to January 1, 1891, the company claimed and collected the full rate or three cents per mile on all its Michigan passenger business. The action was taken on the authority of the decision of this court in the Minnesota case. This helped to swell the local passenger earnings of the company for the year 1890.

In the second place, the suburban business of the company at Chicago increased very much and rapidly from 1888. The increase of this part of the company's business fully explains the addition to the aggregate number of passengers carried, and at the same time fully explains the increase of passenger earnings.

But an analysis of the gross earnings for 1889 and 1890 shows that the increase of earnings in these years over the earnings for 1888 was chiefly due to the freight traffic.

The same explanation applies to the extraordinary piece of testimony introduced in the brief of the State's attorney at page 12 respecting the passenger earnings of

the company for seven months of 1891, and showing the increase over the year 1888. The increase is all due to the suburban business at Chicago and to the through emigrant business of the company in 1891, which is always conducted in third-class cars, and has more the character of freight business than of passenger, although it is classed with the latter.

It will be observed that there is no showing respecting the last statement, of what the operating expenses of the company were for these seven months, nor what its freight earnings were.

If I may be permitted to volunteer some testimony in reference to the business of the company for the year 1891, I say it will be found that its gross earnings fall very much below those of either 1889 or 1890, and that the surplus over the operating expenses was less than half of that of 1889.

VI.

The figures of these reports, and as given in the brief of the State's attorney, show that the Michigan statutory rates are higher than the rates charged by the railway company, says the Attorney General.

This is true of the average rate including through passengers. But this average rate is affected by many elements which do not appear in the reports of the Commissioner, and of which the State's attorney is evidently ignorant.

1. This company's percentage of the through rate for passengers over its road in connection with other roads—all through passengers—produces less per mile than the average rate for local passengers. That is the result, partly, of necessity, growing out of competition. It is justified for the reason that the through passenger traf-

fic is less expensive to the carrier, because of fewer stops, and larger number of passengers to the train than in the general local business.

2. All the company's Chicago suburban business is done at a very low rate, much of it realizing but a trifle over one cent a mile. This is a very large business, and, of course, it reduces the general average per mile. The company can afford a low rate in the traffic because of the quantity. Trains are full, instead of being run one-fourth full or less, as is the case with local Michigan passenger trains.

But it will be seen from the State's attorney's figures that the average rate of fare per mile for local passengers in 1888 was .02.18 cents, or eighteen one-hundredths of a cent more than the Michigan statutory rate. And it is the reduction of this local rate that we complain of. If the local rate for Michigan in 1888 had been two instead of three cents per mile, this average on local passenger business would have been considerably reduced.

The State's attorney further shows that the average local rate per mile for 1889 fell to .02.13 cents, and for 1890 to .01.97 cents. The two cent per mile rate prevailed in 1889 less than three months, to wit, October 3 to the end of December, and these are the poorest months of the year for passenger traffic; while it prevailed during the first four months and a half of 1890.

This requires no comment. The inference is plain.

VII.

The State's attorney points out that there was a remainder of the gross earnings for 1889, after paying operating expenses and current interest, of $131,229.35, which, he says, was available as a dividend on stock; and that for the year 1890 there was a remainder of nearly $122,000.

But "he remembered to forget," or, at any rate, did not state, the further fact, equally shown in the same report, that of this surplus of earnings of 1889, upwards of $123,000 had to be devoted to paying arrearage interest not *earned* in previous years, and that of the surplus of 1890 nearly $110,000 was similarly applied.

Therefore, even these small and grossly inadequate sums for dividend purposes could not be so used, notwithstanding his suggestion to the contrary.

I suppose it is the duty of a railway company to pay its just debts before paying dividends; and I also assume that any restriction or limitation upon its rate of charges that prevents its earning a sufficient sum to do this, the debt not being properly chargeable to capital, and also to pay a reasonable dividend on the stock actually paid up and money properly invested, is an unreasonable limitation; and that if it is embodied in a legislative act, as in this case, the act is invalid.

But if these sums could have been devoted to dividends on the stock, they would have paid less than two per cent. Is the State's attorney prepared to argue here that such a dividend is a reasonable reward to the shareholders—such a reward as any honest and intelligent body of men, clothed with power to determine the matter, would decree to be a just and reasonable return on the capital invested?

On behalf of the plaintiff in error I could ask nothing better than that the broad question as to the effect of this Michigan act upon the earnings of this company not only, but all railway companies of the State, should be considered open here to the investigation of this court, and that for this purpose recourse should be had to everything that appears in the reports of the Railroad Commissioner of the State of Michigan down to and including the report for the year 1891.

I should be entirely willing to rest the case in respect of the reasonableness of the reduction of the passenger fares upon the facts as they are disclosed in these official reports.

VIII.

The Charter Act of the company limited the maximum passenger rate to be charged to three cents per mile. It also expressly reserved the right to alter or amend.

Therefore, the company is held by agreement to the power of the Legislature to so amend the act as to reduce the rate from three cents per mile to two cents, even though the latter rate is unreasonably low.

So argues the Attorney General.

The remedy, in that event, as was held by Justice Morse in this case, is an appeal to the people.

But this ignores the limitation which has uniformly been held to qualify this reserved power, namely, that it does not authorize legislation which would have the effect to appropriate portions of the corporate property to the public use.

Cooley's Const. Limitations, p. 340, p. 721.

This we have sufficiently discussed in the printed brief at pages 24–5.

E. W. MEDDAUGH,
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